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AN EPITOME

OF

REAL PROPERTY LAW

FOR THE USE OF STUDENTS.

BY

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"AN EPITOME OF ROMAN LAW," ETC.

"Quædam collegi et apposui ad juvenum informationem."
Perkins' Profitable Book.

"To them that bee not learned in the Lawe of the Realme this Treatise is specially made." *Doctor and Student.*

FIFTH EDITION.

BY

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LONDON:
SWEET AND MAXWELL, LIMITED,
3, CHANCERY LANE, W.C. 2.
1919.

PRINTED BY
THE EASTERN PRESS, LTD.,
LONDON AND READING.

PREFATORY INTRODUCTION.

THIS little work is not intended to supplant any of the larger manuals, but to be read along with them, or before and after some more copious text-book. Experience has convinced me that the student who attacks a big law book is apt to be appalled by the multiplicity of detail, and the enormous number of cases and statutes. The present work offers him a view of the whole field of Real Property Law, and some other points closely associated with it, in very small compass. It is, in fact, a systematically arranged frame-work, around and on which he may arrange the more detailed knowledge he acquires elsewhere. I believe the greater part of this volume may be almost learned by heart by many, and be understood by most. The system of "catchwords" has been carried out thoroughly by means of italics, capitals, and inverted commas. Long tables of cases and statutes, so essential to the practitioner, so bewildering to the beginner, have been avoided. The short lists which follow (not precede) the text are meant as an integral part of the course, and as a pattern on which the student may enlarge according to his own discretion and capacity. Marginal headings seem inappropriate to matter so closely condensed; the

student who desires them may, if he pleases, find profit in making them for himself.

Among the large number of works consulted, I must particularly express my great indebtedness to the writings of Joshua Williams, Goodeve, Edwards, and Challis. The shortened Conveyancing forms with which the last chapter is illustrated are founded on Key & Elphinstone and on Prideaux. A few points of importance or interest I have added out of my own professional experience.

W. H. H. K.

6 New Court,
Lincoln's Inn.

NOTE TO THE FIFTH EDITION.

This Edition has been completely revised and brought up to date. The portion on Intestate Succession has been largely recast. The Courts (Emergency Powers) Acts, 1914-17, and the Increase of Rent and Mortgage Interest (War Restrictions) Acts of 1915-19 are referred to in footnotes; but in an elementary epitome for students it seemed out of place to deal in detail with these purely temporary measures. The decision of the House of Lords in *Bourne* v. *Keane* that a bequest for the saying of masses for the soul is now a valid disposition was announced during the progress of this work through the Press. It has not, therefore, been possible to deal fully with this important decision in the text; but references to it will be found on page 54 and in the List of Cases.

C. S.

11 New Court,
Lincoln's Inn.
July 1919.

CONTENTS.

		PAGE
PREFACE		v
ABBREVIATIONS		ix
CHAP.		
I.	PROPERTY	1
II.	TENURE	10
III.	ESTATES.—PART I. GENERAL ...	22
	II. ESTATE FOR LIFE	26
	III. ESTATE TAIL ...	38
	IV. FEE SIMPLE ...	46
IV.	DEVOLUTION	63
V.	COMMUNITY	74
VI.	EXPECTANCY	81
VII.	STATUTE OF USES	95
VIII.	INCORPOREAL HEREDITAMENTS ...	111
IX.	CHATTELS REAL	123
X.	MORTGAGE	136
XI.	LIMITATION AND PRESCRIPTION ...	153

CHAP. PAGE
XII. WILLS 162
XIII. CONVEYANCES 179
XIV. CONVEYANCING 198
CASES 215
STATUTES 221
INDEX 227

ABREVIATIONS.

GENERAL.

C.A.	Conveyancing and Law of Property Acts, 1881–1911.
Ch. D.... ...	Chancery Division.
C.L.	Common Law.
C.L.P.A. ...	Common Law Procedure Act, 1852.
C.O.	Central Office.
C.q.t.	Cestui que trust.
Co. Litt. ...	Coke upon Littleton.
Cop. A. ...	Copyhold Acts, 1894.
J.A.	Judicature Acts, 1873, 1875.
L.P.A.A. ...	Law of Property Amendment Act, 1859.
L.T.A. ...	Land Transfer Acts, 1875, 1897.
M.W.P.A. ...	Married Women's Property Acts, 1882–1907.
R.P.A.... ...	Real Property Act, 1845.
R.P.L.A. ...	Real Property Limitation Acts, 1833 & 1874.
Semble ...	"It seems," *i.e.* as probable effect of decision.
Secus	Otherwise.
S.L.A.... ...	Settled Land Acts, 1882–1890.
St.	Statute.
T.A.	Trustee Act, 1893.
V.P.A.... ...	Vendor and Purchaser Act, 1874.
W.A.	Wills Act, 1837.

IN REPORTS.

A.C. & App. Cas.	Law Reports, Appeal Cases.
Bea.	Beavan.
D.G.J.S. ...	De Gex, Jones & Smith.
Eq.	Law Reports, Equity.
K.B.	Law Reports, King's Bench Division.
L.J.Ch. ...	Law Journal (Chancery).
P.D.	Law Reports, Probate Division.
P. Wms. ...	Peere Williams.
Q.B.D. ...	Law Reports, Queen's Bench Division.
Rep.	Coke's Reports.

R.R.	Revised Reports.
Salk.	Salkeld.
S.L.C.	Smith's Leading Cases.
T.C.	Tudor's Conveyancing Cases.
T.L.R.	Times Law Reports.
W.&T.	White & Tudor.
W.N.	Weekly Notes.
W.R.	Weekly Reporter.

IN CONVEYANCING FORMS.

Absoly ...	absolutely.	mtgee ...	mortgagee.
accg	according.	nominon ...	nomination.
admors *or* ads.	administrators.	parly ...	particularly.
appt	appoint.	pchase ...	purchase.
appmnt ...	appointment.	pform ...	perform.
appmt ...	apportionment.	pposes ...	purposes.
conson ...	consideration.	psuance ...	pursuance.
contd	contained.	pon	person.
covt	covenant.	ponal ...	personal.
Cy	County.	posson ...	possession.
decld	declared.	ppy	property.
determon ...	determination.	pd	paid.
dflt	default.	pt	part.
discron ...	discretion.	premes *or* pres	premises.
dth	death.	provons ...	provisions.
efft	effect.	remer ...	remainder.
enablg ...	enabling.	revon ...	reversion.
este	estate.	resue ...	residue.
exors *or* exs ...	executors.	recet	receipt.
hby	hereby.	reprive *or* repres	representative.
hrdts	hereditaments.	respive ...	respective.
hrs	heirs.	respy ...	respectively.
hrof	hereof.	sd	said.
hrunto ...	hereunto.	survor ...	survivor.
hinbfe ...	hereinbefore.	surrer ...	surrender.
hinafter ...	hereinafter.	satisfon	satisfaction.
intt	interest.	thrunder	thereunder.
Indre	Indenture.	togr ...	together.
legy	legacy.	trees ...	trustees.
limon	limitation.	unexped ...	unexpired.
mner ...	manner.	Whas ...	Whereas.
mrrge ...	marriage.	whof ...	whereof.
mtge	mortgage.		

AN EPITOME

OF

REAL PROPERTY LAW

FOR THE USE OF STUDENTS.

CHAPTER I.

PROPERTY.

* *Refer to Table A on page 9.*

THE term "**PROPERTY**" means (1) **right of ownership,** or (2) **things owned.** Rights of property are *primary* rights *in rem*, *i.e.* availing against all the world and not arising out of wrong.

Property in sense (1) is (*a*) absolute (*dominium*), or (*b*) qualified, in other words, restricted (*subdominium*). Ownership, to be in the fullest sense absolute, should be "indefinite in user, unrestricted in disposition, unlimited in duration."* But any civil society must impose checks on such a right, in accordance with the principle of the maxim *sic utere tuo ut non lædas alienum.*† The

* Austin.

† *v.* p. 50.

ownership of movables, designated in English Law *Personalty*, approximates very closely to the type of absolute ownership. An "estate in fee simple" in land, which in English Law is designated *Realty*, also in practice approximates to this type, though in theory, as derived from the feudal system, there is no such thing as ownership of land by a subject.

Qualified or restricted ownership is illustrated by right of way over, or of rent charge on, land of another. Such rights are strictly limited and definite.

Ownership, whether absolute or qualified, is now the subject of transfer either by will or *inter vivos*, and no interference is permitted in English Law with this right of ownership, and no forcible dispossession can operate unless by express statutory provision; *e.g.* under the Lands Clauses Consolidation Acts, 1845, *et seq.*, lands may be compulsorily acquired from their owner, but only on strict compliance with the very peremptory provisions of those statutes.

Ownership may also be divided according to the time of its enjoyment whether in *possession* or *expectancy* (*i.e.* present or future); and further, it admits of *severalty* or *community* (*i.e.* single ownership or co-ownership). Both these divisions are commonly said to vary in *quality*.

The last great division is into *legal* and *equitable* estates, according as the owner holds the

property in his own name or another called a trustee holds it in trust for him as beneficiary.

Property in sense (2) admits a natural division into things *movable* and *immovable*; but the principal division in English Law is into things *real* and *personal*—a division which nearly, but not quite, agrees with that into immovable and movable. It is convenient to consider the subject in this order—

(i) **REAL.**
(ii) **PERSONAL.**
(iii) **MIXED.**

"Real" is a comparatively modern term; the older phrase was "lands, tenements, and hereditaments." The modern term is derived from the old remedy for dispossession. The person wrongfully dispossessed of land could bring a *real* action, *i.e.* claiming the land, in other words the thing (*res*) itself. The person wrongfully dispossessed of goods could formerly only bring an action for damages against the *person* of the wrongdoer.* The corresponding term "personal" has nearly supplanted the older name "goods and chattels."

The differences, practical and theoretical, between real and personal property are chiefly these: (i) the kinds of ownership of real in point of *quantity* are called *estates;* in personalty only is there absolute "ownership," and not estates;

* v. *Epitome of Personal Property Law.*

(ii) some modes of transfer (*e.g.* conveyance) are appropriate only to things real, others (*e.g.* assignment) to things personal; (iii) he who takes the benefit of realty under a will is *devisee*, a beneficiary of personalty is *legatee*, either kind of property (since the passing of the Land Transfer Act, 1897) generally vesting on testator's death in executor, and passing through him indirectly to devisee or legatee; (iv) on intestacy similarly realty in many cases passes through administrator to *heir*, personalty to *next of kin;* (v) personalty is liable as *assets in priority* to realty for payment of deceased's debts, unless he has himself otherwise provided; (vi) before the Finance Act, 1894, "probate duty" was payable on personalty only, but *Estate Duty* which has superseded it is payable on all property, both realty and personalty.

REAL PROPERTY comprises (1) **immovables** (except leaseholds), either (*a*) corporeal, *e.g.* lands, tenements, and hereditaments, or (*b*) incorporeal, *e.g.* rents, tithes; (2) **incorporeal hereditaments**, *e.g.* rights of way over land: (3) personalty **"notionally"** converted, *i.e.* ordered to be laid out in buying land, *e.g.* a testator directing by his will money to be invested in the purchase of land; (4) a very few cases of **company shares**, *e.g.* in the New River and the Avon Navigation Companies.

PERSONAL PROPERTY comprises (1) **moveables**; *e.g.* goods and chattels, (2) **leaseholds** and

benefits arising thereout, *e.g.* rent of leaseholds is personalty; (3) realty "**notionally**" converted, *i.e.* ordered to be sold, and thus turned into money, *e.g.* testator directing his lands to be sold and invested in consols.

MIXED PROPERTY comprises certain different kinds of property which depend for their classification as real or personal property respectively on the particular circumstances. These comprise (1) **trees** (real while standing, personal when severed); (2) **emblements,** or *fructus industriales*, *e.g.* growing crops which at the death of the tenant uncut although sown by him, which on intestacy pass as personalty, but under a will generally as realty; (3) **fixtures,** which, if *domestic, ornamental*, or *trade* fixtures, may be removed by tenant for life or years or by personal representative, and, if *agricultural*, can, under Agricultural Holdings Act, 1908, be removed by tenant on notice to landlord, but which in other cases become legally affixed to and consequently part of the realty, under the maxim **Quidquid plantatur solo, solo cedit** (*Elwes* v. *Maw*). Fixtures affixed to the freehold cannot be seized and sold for default in payment of rent, whereas tenant's fixtures may be; (4) **animals** *feræ naturæ*, which, while such in a park, or other similar enclosure, are subject to qualified ownership and descend as realty, but if confined in a house, cage, &c., become, while so confined, absolute personal property, and on the owner's death devolve as

such; (5) **title-deeds,** which naturally go with the inheritance, but may be deposited by way of mortgage, and in the hands of mortgagee are for the time being personalty; (6) **heirlooms,** *i.e.* movables which by *special custom* go with the inheritance to heir or devisee, but which the owner can during his lifetime sell, when they become pure personalty in the hands of the purchaser. Similarly with "*ensigns of honour*," *i.e.* family armour or banners hung up in churches, and *deed boxes* in which title-deeds are wont to be kept. N.B.—The term *heirlooms* is often, less properly, applied to "settled chattels," *i.e.* plate, pictures, curiosities, &c., vested in trustees to go (for as long a period as the law allows) with a family mansion, estate, or title. Settled chattels differ from heirlooms, because (*a*) their devolution does not depend on special custom, (*b*) the limited owner cannot at C. L. sell them, (*c*) if the trust is not renewed from time to time it will run out, and thus that person will become absolute owner not only of the mansion, house, etc., but of the chattels settled with it, and so can sell or devise them apart from the land—if he dies intestate they pass to his personal representatives and not to his heir; whereas heirlooms are never the absolute property of any person, unless in the hands of a purchaser from the holder as authorised by the Court.

Again, shares in certain undertakings are legally Realty, *e.g.* New River Company Shares,

notwithstanding the general rule that all shares are Personalty.

"Notional things" is a phrase admitting of two meanings, (I.) **things** which physically resemble realty, while in contemplation of Law personalty, or *vice versâ;* or (II.) **acts** forming the subject of a right.

(I.) includes: **things seemingly real, legally personal;** *e.g.* (i) *partnership* lands as between partners themselves, or between them and representatives of a deceased partner; (ii) *mortgagee's* interest in mortgaged lands, which on his death vests in his personal representative; (iii) *creditor's* interest in judgment debtor's land taken by *elegit*, which devolves similarly; (iv) land notionally *converted:* **things seemingly personal, legally real;** *e.g.* (i) money notionally *converted;* (ii) "*capital* money" arising from sale of land under S. L. A.; (iii) sale money of land compulsorily sold to Railway and other Companies and Corporations under Lands Clauses Acts, &c.; (iv) sale money of land of *Infants* or of *Lunatics* sold by order of Court.

(II.) may be illustrated in regard to personalty by *copyright* and *patents;* in realty by *Advowson* (*i.e.* right to present to a benefice) and *Franchise* (*e.g.* right to levy tolls for ferry or market, &c.).

The older name for Realty, viz. "land," tenements, and hereditaments," comprises three terms which are not co-extensive.

"**Land**" generally includes the earth with all

above it *usque ad cœlum* (hence, a lake or pool is "so much land with water on it," water *per se* being incapable of property as realty, and grant of *water* merely conveying fishing rights), and *usque ad inferos* (hence, grant of land without reservation carries minerals). Exceptions: (i) "Royal mines," *i.e.* of gold and silver; (ii) timber and minerals on copyholds; (iii) Lands taken under compulsory purchase under Lands Clauses Acts which do not carry minerals, except by express grant. In several modern statutes, *e.g.*, C. A. and S. L. A., "land" is defined so as to include (generally speaking) any interest therein.

"**Tenement**" is wider, including (i) land; (ii) profits *à prendre* (*i.e.* rights of common, &c.); (iii) offices for life—in short, all things capable of tenure. In deeds it often has its popular sense, *i.e.* a house.

"**Hereditament**" is the widest term, including (i) land, tenements, and personalty notionally converted; (ii) heirlooms (not settled chattels); (iii) *conditions* annexed to an estate, *e.g.* right of landlord in certain events to re-enter; (iv) titles of nobility—in short, all things capable of inheritance. Hereditaments are "corporeal," carrying right of immediate or future possession of the actual land itself, or "incorporeal," carrying only certain rights over or in connection with the enjoyment of the land, *e.g.* a right of way; but the distinction is now of little practical importance. Still, the name "incorporeal here-

ditaments " * is convenient for grouping together the various kinds of qualified ownership, as these do not consist in any right of possession of land. In its older sense, this term included also rights of *future* possession (*e.g.* remainders), which were said to "lie in grant," while corporeal hereditaments, as rights of *immediate* possession, lay "in livery," *i.e.* were conveyed by actual delivery of such possession.†

The Common Law of England applies since the reign of Henry VIII. to Wales, but not to either Scotland, Ireland, the Channel Isles, or the Isle of Man; English Acts of Parliament extend to Scotland and Ireland "unless expressly excepted" by some proviso therein, **Articles of Union (Scotland) Act, 1707,** and the **Articles of Union (Ireland) Act, 1800;** the English Acts of Parliament do not extend to the Channel Isles, Isle of Man, or the Colonies "unless expressly included."

TABLE A.

- Property
  - Ownership rights
    - Absolute
    - Qualified
  - Things owned
    - Real
      - Immovables
      - Incorporeal hereditaments
      - Personalty notionally converted
      - New River and Avon shares
    - Personal
      - Movables
      - Leaseholds
      - Realty notionally converted
    - Mixed
      - Trees
      - Emblements
      - Fixtures
      - Animals *feræ naturæ*
      - Title-deeds
      - Heirlooms

* *v.* Chapter VIII. † *v.* Chapter XIII.

CHAPTER II.

TENURE.

* *Refer to Table B on page* 21.

In theory, all land in England is supposed to be holden of the Sovereign of the Realm, by some system of Tenure; the most general of which is the Feudal System, so named from its supposed derivation from the word "fief" or "fee," meaning literally a reward for services rendered.

The **FEUDAL SYSTEM,** of which traces appear under the later Saxon kings, Canute, Edward the Confessor, and Harold, was developed under Norman rule, and forms the foundation of Real Property Law. Writers of repute state that the Feudal System of tenure was legally adopted in England by the Council of Salisbury held in 1086, and it was doubtless the desire for its general acceptance throughout England that led to the compilation under the direction of William the Conqueror of the "Domesday Book" in 1080-1086. Under the Saxon *régime* there was allodial land (*i.e.* subject to private ownership and not liable to the performance of services to the

king): under the Norman rule "the king of Domesday is the supreme landlord; all the land of the nation, the old folkland, has become the king's; and all private land is held mediately or immediately of him." * The folkland (*publicus ager*) was thenceforth "Crown land" (*Terra Regis*), which the king could grant to his subjects till the Crown Lands Act, 1702, restrained the practice. All other land was considered to be held of the king as lord paramount; those who held of him directly being tenants *in capite*, below whom were generally various *mesne* lords; while, last of all, in actual occupation, no man holding of him, was the tenant *paravail* (or terretenant). No subject was, or (in theory) even now is, *owner* of land; he is at most a *tenant* holding a tenement or *estate* in land. This method of subinfeudation was advantageous to both the king and his subjects, for he obtained thereby a standing army, each individual of which was bound by his oath of fealty to follow him in time of war, and the tenant obtained the protection of the Chief of the Realm as his lord paramount. As a return or rent for his lands, the tenant had to perform certain services which were of one of two kinds: (*a*) **Free,** *i.e.* those worthy of a freeman, *e.g.* personal military service in time of war; (*b*) **Base,** *i.e.* those of a servile character, *e.g.* ploughing the lord's lands.

* Stubbs.

When these services were worthy of a freeman, viz. honourable, the estate was called a **frank tenement** (*liberum tenementum*), which is now called **"FREEHOLD."** Where the services were "base," viz. servile, there was *base* tenure or tenure in **villeinage**, which was the origin of modern **"COPYHOLD."** As for farmers or other occupiers of land not having estates of such free or base tenure, they were deemed to have no estate at all; their interest was merely personal as bailiffs or as licensees. Feudal possession of a frank tenement was *seisin*. The tenant's interest, never shorter than his own life, was a *fief* or *fee*—a term afterwards confined to estates of *inheritance*. Where the estate was only for the tenant's life, he was said to be "seised in his demesne (*in dominico suo*) as of freehold"; where it was of inheritance, descending on the tenant's death to his heirs, he was said to be "seised in his demesne as of fee." Thus "tenure" is the method by which the "tenant" held his "tenement"; "estate" is the *quantum* of tenant's interest.

FREEHOLD tenure was primarily divided into (1) **KNIGHT SERVICE** and (2) **FREE SOCAGE**, so called from its supposed derivation from the word *Soc*, meaning "plough"; (1) included various kinds of military service or money commutation ("escuage") for it; (2) comprising the holding on non-military services, *e.g.*, personal services of an *agricultural* kind,

money payment not as escuage, or mere oath of *fealty*. The Statute of Tenures, 1660, turned Knight Service into Free Socage, with the one exception of Grand Serjeanty, which survives to the present day.* The feudal incidents of tenure of freehold still surviving are (i) *escheat* to the king as lord paramount on death of tenant intestate and without heirs; (ii) *relief* (*i.e.* one year's rent on succession to deceased tenant), and still more rarely (iii) oath of *fealty* (never exacted); (iv) *forfeiture* on neglect of services; (v) *fines on alienation;* (vi) occasionally a small **chief-rent.**

The ancient feudal incidents of Wardship, Knighthood, &c., were all abolished by the Statute of Tenures.

In addition to the ordinary freeholds, there are five of peculiar tenure, viz. (*a*) **Grand Serjeanty,** (*b*) **Petit Serjeanty,** (*c*) **Tenure in Burgage,** (*d*) **Gavelkind,** and (*e*) **Frankalmoign.**

(*a*) **Grand Serjeanty** is a relic of Knight Service, still preserved by Statute of Tenures, consisting in tenure *directly* of the Crown by honorary service in *person, e.g.* being King's Marshal

* As the old Statute of Wills, 1540, had enacted that all free socage land was disposable by will the land formerly held by military Knight Service tenure became alienable by will, whereas previous to the Statute of Tenures a tenant by Knight's Service could dispose of two-thirds only of his fee by his will, and previous to the old Statute of Wills, 1540, Knight Service lands were not devisable at all.

(Duke of Norfolk), King's Champion (Dymoke of Scrivelsby), (both of which were evidenced at King George V.'s coronation).

(*b*) **Petit Serjeanty** is a variety of Free Socage, consisting in tenure *directly* of the Crown by service of yielding yearly something *appurtenant to war, e.g.* a pennon (Dukes of Marlborough and Wellington both hold lands at this day by this tenure).

(*c*) **Tenure in Burgage** is the holding of freeholds parcel of an *ancient borough*, or city, *e.g.* the ancient City of Gloucester, which generally held its lands *directly* of the Crown, subject to various local customs, of which the chief is "*Borough English*," *i.e.* the custom of descent of land on intestacy to the youngest son; sometimes this extends to the youngest daughter, brother, &c., of the deceased. It is probable that this custom is really the oldest form of intestate inheritance, dating from præ-Keltic times.

(*d*) **Gavelkind** is Free Socage subject to custom of gavelkind, found chiefly in Kent, where the Law *presumes* all lands to be gavelkind until proof of disgavelling by statute; elsewhere, *e.g.* in manor of Ealing, it is a question of *evidence*. "Custom of gavelkind" involves (where found in its completeness) five elements, viz. (*a*) descent to sons or male collaterals (*Re Chenoweth*) *equally;* (*b*) power of alienation by infant by

way of *feoffment** at age of fifteen; (*c*) *curtesy*† by husband in a moiety of his wife's lands until remarriage; and (*d*) *dower*‡ by widow in a moiety only of her husband's lands during widowhood; (*e*) *devisability* of land before old St. of Wills, 1540; and (*f*) non-liability to *escheat* for felony, even before Forfeiture Act, 1870. This last is expressed in the doggerel, "The father to the bough, the son to the plough," *i.e.* the son can keep his lands and plough them after his father is hanged.

(*e*) **Frankalmoign** was the spiritual tenure by grant to an ecclesiastical corporation, aggregate or sole, to hold without fealty *in liberâ eleemosinâ*, under a *general* obligation to say masses and prayers for the souls of the donor and his heirs. At the Reformation the greater part of these spiritual services were abolished as "superstitious uses." Frankalmoign was expressly preserved by St. of Tenures. Probably a large part of present glebe and other ecclesiastical lands are really subject to this tenure, but inextricably mixed up with other lands held by "tenure of *Divine Service*," *i.e.* by *particular* obligation of saying masses and prayers (now prayers only) *pro populo*, or for the parishioners, &c. The tenants holding by tenure of Frankalmoign had to perform certain services, known as the "trinoda necessitas," which services are now obsolete.

* *v.* p. 179. † *v.* p. 68. ‡ *v.* p. 67.

COPYHOLD TENURE had its origin in the action of the superior feudal lords creating Manors by means of "subinfeudation," *i.e.* the granting of lands to sub-tenants to hold on similar terms as the lord himself held; thus the lord of the manor became a little king in his own domain, and a manor an aggregate of lands of different descriptions subject to his seigniory or lordship. Manors must have been created prior to the Statute of Quia Emptores, 1290, which abolished alienation by subinfeudation. The lands comprising a manor are of two kinds, with three subdivisions of the second: (*a*) **Freehold parcels** held in fee simple by freeholders (as distinct from "copyholders") of lord of the manor, subject to (sometimes) chief-rents, reliefs, heriots, &c., also to customary descent, and escheat to lord on death intestate without heirs. (*b*) **Demesne,** including *demesne lands* proper, with castle, or manor-house, or mansion-house, thereon; *Villeins'* lands under modern name of *copyholds;* and *Wastes,* on which both freehold and copyhold tenants have certain right of common.* To each manor was attached a "Court Baron" for freeholders, "a Customary Court" for copyholders, and often a "Court Leet" with minor criminal jurisdiction. These seem to have grown out of one earlier Court, the *halimot.* (Qu. hallgemote.) The first and last

* *v.* p. 114.

are in general practically obsolete. It is essential to a manor that there should be a *possibility* of Court Baron, and therefore at least two freeholders of the manor capable of constituting such a Court; otherwise it becomes only a "reputed manor." A collection of several adjacent manors under one lord is an "Honour."

Copyholds originated with villeins' lands or parcels, held perhaps at first by serfs literally "at the *will* of the lord according to the custom of the manor"; but as early as 1219 there was a distinction between *liber* and *libere tenens*, *i.e.* a man without being personally *villanus* might hold land by villein tenure. Villeins were sometimes described as "regardant," *i.e.* annexed to the manorial lands; sometimes as "in gross," *i.e.* attached to the lord's person, but it is not certain that these names represented any real distinction. At the latest from date of Edw. IV., no copyholder could be ejected merely by the lord's caprice; the forfeiture must have been occasioned by the tenant committing a breach of duty or neglect of services. A record kept of the duties and services of each tenant, and called the "Court Roll," originated the term "tenants by Court Roll," or by "copyhold," *i.e.* the muniments of title of the tenant were copies of the Court Roll. Copyholds in general date from before *Quia Emptores*, but in some manors by special custom arose by later grant out of the waste lands; this practice is now obsolete,

for any such grant newly made since Cop. Act, 1894, constitutes the lands freehold. In all copyholds the seisin of the freehold is in the lord.

The peculiar incidents are chiefly ten, viz.:— [1] fealty; [2] suit of Customary Court; [3] quit-rents; [4] fines and reliefs, by special custom; [5] heriots, also by special custom (due as "heriot *service*" from tenant of particular lands, or as "heriot *custom*" from copyholders in general of manor); [6] escheat to lord on failure of heirs; [7] forfeiture, especially for illegally leasing for more than a year without the lord's licence, opening mines, or cutting timber (hence it is said in Sussex, "The oak scorns to grow save on free land," because copyholder has no interest in keeping up timber, while the lord cannot come on land to plant or cut without leave); [8] seizure *quousque*, *i.e.* lord may seize copyholds on non-appearance of an heir, and after proclamation at three successive Customary Courts hold and enjoy profits unless and until he appears; [9] transfer by *surrender* and *admittance*, *i.e.* surrender by transferor to lord *to use of* transferee, and subsequent admittance of transferee on payment of fine to lord and fees to steward of manor (N.B.— Formerly both took place in Customary Court, surrender being by delivery of a rod, symbolical of the delivery of the actual land; now, by various statutes such proceedings are transacted out of Court, generally in steward's office, transferor "delivering" office ruler, or the like, by

way of symbolic rod); [10] peculiar customs as to *freebench, curtesy,** and *descent* on intestacy. Of these [9] is the most important, necessity of *admittance* being the essential of copyhold tenure; thus in copyholds a mortgagee is not generally admitted, so as to evade the fines, &c., payable to the lord and the trouble it would entail on the mortgage being paid off of a new surrender and admittance to the mortgagor. Particular customs of descent may either affect copyholders only, or in some manors extend to the freeholders also.

Under numerous statutes, many manorial rights may be, and often have been, *commuted* into fixed annual payments or lump sums. *Enfranchisement*, converting copyholds into freeholds, has also taken place **at C. L.** and **under many earlier statutes; now under Cop. Act,** at instance of lord or copyholder. Under this Act, the compensation payable to the lord may be amicably agreed between the parties or compulsorily awarded by Board of Agriculture (formerly "Land Commissioners"), but the lord continues entitled to *minerals* and *escheat* of enfranchised copyholds. Although copyhold land may be converted into freehold, no conversion *vice versâ* can be effectual, as copyhold can exist only by immemorial custom. On escheat, forfeiture, or unconditional surrender of a copy-

* *v.* p. 68.

hold, the lord may at his option (1) re-grant it as copyhold, or (2) treat it as freehold of the manor. If a copyholder marry the lady of the manor, his copyhold estate is in *abeyance* during coverture. If a copyholder acquire an estate of freehold in the *same* land, the copyhold is extinguished, *e.g.* if the copyholder becomes Lord of the Manor.

Two other tenures by which lands (generally of copyhold character) may be held are (1) **"Antient Demesne"** lands and (2) **customary freeholds.**

Ancient Demesne, also formerly known as privileged villeinage, exists in manors which appear in Domesday Book as crown lands under Edward the Confessor, or William I. Possibly these tenants obtained their enfranchisement earlier than the other villeins; until 1833 these tenants had the doubtful privilege of suing and being sued in their own Manor Court, and were exempted from payment of certain tolls and taxes. These incidents, perhaps, more generally belonged to the copyholders, but sometimes also extended to freeholders of the manor.

Customary freehold lands are found in some manors (principally those of ancient demesne) perhaps once held by *sokmanni*, a class intermediate between freeholders and villeins. At the present day such tenants are generally a mere variety of copyholders, expressed to hold "according to the custom of the manor," but

not even technically "at the will of the lord." In other cases, when their title does not require *admittance* for completion (less probably where they differ from ordinary copyholders only by having right to timber and minerals), they have the seisin and are true freeholders.

TABLE B.

- Tenures
  - Free or honourable
    - Knight service ... Grand serjeanty
    - Free socage (modern freehold) ... ... Petit serjeanty, Burgage, Gavelkind
  - Base or servile ... Modern copyhold, Antient demesne, Customary freehold
  - Spiritual ... ... Frankalmoign

CHAPTER III.

ESTATES.

* *Refer to Table C on page 62.*

I.—*General.*

REAL property can in theory be only held for an estate; and estates in point of *quantity* are commonly divided into (1) **FREEHOLD**, and (2) so-called "estates **LESS THAN FREEHOLD**" (more correctly *interests*). (1) is subdivided into (i) **estate of inheritance**, or *fee*, and (ii) **estate for life**; (i) is again subdivided into (a) *fee simple*, and (b) *fee tail*. **ESTATES LESS THAN FREEHOLD** are subdivided into (i) lease for a fixed term of years, (ii) tenancy from year to year, (iii) tenancy at will, (iv) tenancy by sufferance. A lease for years expires at end of the fixed period for which it is granted. Tenancy from year to year and tenancy at will can be determined by notice, a tenancy by sufferance can be determined without any notice. On the other hand, an estate in fee simple can only expire by the death of the tenant intestate and a failure of heirs direct or collateral, when it escheats to the Crown. Most estates may be so constructed as to

be liable to abridgment on the happening of some event. An estate, whether in fee simple or less, may be granted on *condition subsequent*, *i.e.* that on some *subsequent* event (*e.g.* non-payment of rent, or breach of some covenant) the grantor or his heirs shall have the right to re-enter and thereby determine the estate. An estate subject to a condition subsequent is well illustrated by the every-day mortgage—the mortgaged lands are vested in the mortgagee subject to their reconveyance to the mortgagor on the payment of the principal interest and costs. Any estate less than fee simple may also be granted by way of *conditional limitation*, *i.e.* so as to subsist unless and until some event occur, and on the occurrence of such event, then *ipso facto* to determine without any need of re-entry, *e.g.* grant of Blackacre to A. while he continues unmarried; if A. remains unmarried all his life, the estate will amount to an estate for life. A creditor who holds his debtors' lands under writ of elegit obtains an estate by way of conditional limitation.

The time-honoured example of a conditional limitation (in Coke upon Littleton) is "to A. B. and his heirs, tenants of the manor of Dale," *i.e.* a grant of lands to be held by A. B. and his heirs so long only as they continue to be *also* tenants of the manor of Dale. This is a determinable fee, but it is not certain that such a grant *by a subject* making the grantee tenant

in fee simple under the grantor would be valid since *Quia Emptores*, 18 Edw. I. A.D. 1290,* and it seems also impeachable as a perpetuity.†

Words expressive of condition subsequent are "if," "upon condition that," "provided that," "so long as," &c. Words expressive of conditional limitation are "until," "while," "so long as," &c. A condition may also be *precedent, i.e.* necessary to be fulfilled *before* estate can vest, consequently, if the precedent condition is impossible or illegal, the estate never vests in the grantee, but the tendency of the Court is to construe condition in a will, if possible, as subsequent, this being more favourable to devisee (*Re Greenwood*).

A condition subsequent is distinguishable from a conditional limitation in that in the former the grantee's estate is not determined until the grantor performs some act to enforce the condition, *e.g.* enters on the premises; whereas in the latter case the grantee's estate determines immediately on the happening of the particular event, without any act on the part of the grantor.

Estates may in addition to being held on an *express* condition be also held subject to some *implied* condition, *e.g.* that a tenant for life shall not commit waste.

Instances of estates liable to abridgment are (1) fee simple or other estate followed by

* *v.* Edwards, pp. 45, 46, and Challis, p. 228. † *v.* p. 54.

executory interest;* (2) mortgagee's estate subject to proviso for redemption and reconveyance on repayment of loan; (3) estate by *elegit* of a judgment-creditor until his debt is satisfied out of rents and profits; (4) an estate in fee tail which on failure of issue capable of taking under the entail is abridged into a tenancy in tail after possibility of issue extinct, in other words, into a mere life estate.

An estate of freehold may be defined as an "estate in lands of free tenure for *uncertain* duration." A grant "to A. for 999 years," though longer than any human life, is of *certain* duration, and therefore is an interest less than freehold. So, too, is a grant "to A. for 99 years, if he shall so long live," though here the certain duration is liable to be abridged by A. dying before the end of the term. Estates of freehold are three only: fee simple, fee tail, and estate for life. The first and third are at least as old as Saxon times, in some shape or other, and are equally found in copyholds. The second is not older than *De Donis* (13 Edw. I., 1285), and by custom is found in copyholds of some manors. But at the beginning of the feudal system, an estate for life seems to have been the commonest. Perhaps for this reason, a grant of land "to A." simply, without words "limiting" or designating inheritance, has

* *v.* p. 90.

always been considered a grant of estate for life only. It will be convenient to consider this estate first.

II.—*Estate for Life.*

An **estate for life** is one limited in its inception to the life of the tenant, or of another or others, created (*a*) by act of a party *inter vivos* or *by will*, or (*b*) by *operation of law*. (*a*) may be in a deed expressly limited to a life, *e.g.* a marriage settlement, or as shown *ante*, by simple grant without any words of limitation; but in a will only by express or clearly implied limitation for life, since W. A., sec. 28, expressly provides that a devise without words of limitation is to pass the whole of the testator's estate in the devised property. Thus, a devise "to A." would give A. the fee simple if the testator owned a fee simple; but if X. leaves land "to B. after A.'s death," then, if B. is X.'s heir at law, A. takes "a life estate by implication," but, if B. is not X.'s heir at law, then X.'s heir at law takes the land until A. dies. (*b*) includes (i) *Dower*, (ii) *Curtesy*, (iii) "*Tenancy in tail after possibility of issue extinct.*"* An estate for the life of another or others is called estate *pur autre vie*, and if for more lives than one is often termed "a lease for lives." It arises either by original grant or devise, as "to A. for life of B."; or by

* *v.* p. 42.

assignment of ordinary life estate, *e.g.* A. grants Blackacre to B., and B. subsequently assigns his life interest to C., here C. is tenant *pur autre vie*, and B., in both cases, is *cestui que vie*, *i.e.* the person for whose life the estate is to be held. Further, the grant to A. in the first case, or the assignment to C. in the second case, may be "to A. (or C.) and the heirs of his body," or "to A. (or C.) and his heirs." If now D. is the heir at the death of A. (or C.) during the life of B., D. is said to succeed as *Special Occupant*. In case of a simple grant or assignment without words of limitation, if A. (or C.) die in B.'s life-time, there is clearly no special occupant. In such case formerly the first comer could seize the land and hold for the rest of B.'s life as *General Occupant*. This unseemly scramble was abolished by St. of Frauds (29 Car. II., 1677), and now by W. A. (i) tenant *pur autre vie* may *dispose* of the residue of his estate by will; (ii) if he did not, and it came to a special occupant, it was *chargeable in his hands* as assets by descent for payment of deceased's debts; (iii) if no special occupant, it shall be assets in the hands of the *personal representative*, who, after payment of debts, shall distribute the residue among the next-of-kin. By the Land Transfer Act, 1897, on death of a tenant *pur autre vie*, his estate devolves in the first place upon his personal representative, whether there is a special occupant or not or whether there is a will

or not, and the personal representative, after debts have been satisfied, transfers the estate to the devisee or special occupant or next-of-kin as the case may be. If there is any doubt whether or not the *cestui que vie* is living, the person who would succeed on his death as reversioner or remainderman may, under Cestui que vie Act, 1707, obtain from the Ch. D. an order for his production (usually at 12 noon on a given day at the parish church door), and if not produced or accounted for he is taken to be dead.

Any estate for life may come to an end during the lifetime of the tenant for life. It may be assigned to another by *deed* (R. P. A.). It may also determine by (i) *surrender* to the reversioner; (ii) by *merger*, as if the tenant for life acquires the reversion; or (iii) by *forfeiture*, formerly by "civil death" through entering a monastery, now either by *outlawry* in criminal cases, or by breach of some condition on which the estate depends, *e.g.* grant by testator of a life estate to his widow on her remaining unmarried. Until 1845 it was such a breach for the tenant for life to attempt to convey by feoffment any greater estate than he really had, whence a feoffment was said to have a "tortious operation," causing forfeiture. This was abolished by R. P. A., and a feoffment, if used at all, is become "an innocent conveyance," transferring just so much estate as the transferor lawfully can and does profess to convey.

For encouragement of agriculture a tenant for life is allowed *Emblements*, *i.e.* the crops sown by him but reaped after his death which belong to his personal estate, and crops sown by tenant *pur autre vie* before, and harvested after, death of *cestui que vie* belong to tenant himself; if the estate terminate by reason of the tenant's own act there can be no claim for emblements. By Apportionment Act, 1870, rent due from tenant for years on lease determinable on death of tenant for life is apportioned, *i.e.* if he die between two quarter-days, an aliquot portion of the rent for this current quarter goes to his personal estate.

A tenant for life, unless expressly restrained, has a right to *Estovers* (supposed derivation from the word estoffer, meaning, to furnish) comprising chiefly *plough-bote* (wood for agricultural implements), *hay-bote* (for fences), and *house-bote* (for fuel and house repairs).

On the other hand, he is (unless expressly authorized) liable for *Waste*. Waste is (i) voluntary, (ii) permissive, (iii) equitable. (i) consists in acts of commission, *e.g.* pulling down buildings, felling timber, opening mines, quarries, &c., and changing ancient meadow land into arable or *vice versâ* — in short, permanently injuring or altering the character of the inheritance in which the tenant has merely a limited interest. Timber is oak, ash,

elm by general custom, and various other trees by local custom (*e.g.* beech is timber in Bucks, not in Oxon). Timber trees under twenty years are *Germins;* and neither timber nor germins may be cut by tenants for life, except that (a) he may cut germins for *necessary thinning* of overgrown plantations, and (b) on recognized "timber estates" he may *periodically* cut so much as by local usage can be counted as annual fruits of the land so cultivated (*Dashwood* v. *Magniac*). And by S. L. A., sec. 35, tenant for life, even though impeachable for waste, with consent of trustees or order of Court, may cut and sell ripe timber, three-fourths of proceeds going to "Capital money" for benefit of inheritance, one-fourth as rents and profits to himself; if not impeachable for waste, the tenant for life can cut and sell timber (not being ornamental timber) without consent of the trustees or of the Court, and take the whole of the proceeds for himself (*Lewis Bowle's Case*).

(ii) consists of acts of omission, *e.g.* non-repair of buildings, for which tenant for life is not liable, unless the duty has been *expressly* cast on him (*Re Cartwright*).

(iii) A tenancy for life may be expressly created as "not impeachable" or "dispunishable" for waste. The tenant is then still liable for equitable waste, *i.e.* such waste as was formerly forbidden only by Equity, and now by J. A., sec. 25. This is such "malicious or

humoursome waste" as destroying or defacing the family mansion, or cutting ornamental timber. But where such tenant for life has thinned or otherwise reasonably cut ornamental timber, as the Court would permit, he is entitled to the proceeds (*Baker* v. *Sebright*).

By various Acts, a tenant for life is empowered to borrow public money charged on the inheritance for many useful purposes, *e.g.* draining, road making, &c.; also erecting, completing, or improving mansion-house. By Settled Estates Act, 1877, very large powers were given to him to be exercised by *leave of Court*, which hitherto had required a private Act of Parliament. But this Act, although not repealed, is almost superseded by S. L. A., 1882-1890. Under these Acts, a "tenant for life" is any legal or equitable limited owner or owners beneficially entitled to the settled land *for life* under settlement (including will) for *successive* beneficiaries. Tenants in common or joint tenants *together* constitute the tenant for life under the Acts, and the *consent* of one, when such consent is required under the S. L. A., is sufficient to bind the others (S. L. A., 1884); the *powers* conferred by the Acts must, however, be exercised by all the tenants (S. L. A., 1882); a tenant for life of an undivided share may deal with his share without any concurrence by the others (*Cooper* v. *Belsey*). All trustees with present or future *general power of sale* over the lands, or *present* power of sale

over other lands similarly settled, are "trustees for purposes of Acts." Settled land is defined by the Act to include all lands the subject of a settlement, whether created by deed, will, marriage, or other agreement for a settlement by which land is limited in trust for any persons *by way of succession.*

Under the powers of the Acts, the tenant for life may sell, exchange, or lease (and for that purpose enter into any necessary contract, which will be enforceable against every successor in title of the tenant for life), subject generally to *five* conditions: (1) He must take the *best* price or consideration reasonably obtainable; (2) he must have regard to the interest of all beneficiaries under the settlement, for whom he is deemed to be acting as *trustee;* (3) he must give *written notice* of at least one month to the trustees (two at least), and to their solicitor (if any); (4) in case of doubt or dispute he or the trustees may *apply to the Court* by summons; (5) he must obtain leave of the trustees or order of Court for sale of the principal *mansion-house* and *demesnes,* and order of Court only for sale of *settled chattels.** If the land sold or exchanged is incumbered, he may, with the consent of the incumbrancer, charge the incumbrance on any other part of the settled land. If a lease, this must be granted by deed, and a

* *v.* p. 35.

counterpart must be executed by the tenant for life with a condition for re-entry if rent not paid within 30 days. The sale-money, with other moneys arising from exercise of the powers of the Acts, is "capital money," to be paid to the trustees or into Court at the tenant's option, to be dealt with as provided by the S. L. A., viz. (i) invested according to directions of *tenant for life* (if his discretion is exercised *bonâ fide*, neither the Court nor the trustees may interfere (*Re Coleridge's Settlement*)); if no directions given, at discretion of trustees, in *authorized securities* (*i.e.* authorized by settlement, or Government (under Trustee Act, 1893, sec. 1, and the Colonial Stock Act, 1900), or other trust securities); (ii) expended on *authorized improvements* (viz. draining, roads or streets, railways or canals, farmhouses or cottages, &c. (*Re Lord Gerard's Settled Estate, re Clarke's Settled Estate*), on an approved *scheme* submitted to the approval of the trustees or the Court, and certified by the Board of Agriculture or a competent engineer or surveyor); (iii) discharge of *incumbrances;* (iv) *purchase* of other lands to be similarly settled; (v) *payment out* to persons absolutely entitled; and (vi) *costs*, which (in action, &c.) may also under order of Court be raised by sale, mortgage, or change. An amount not exceeding half annual rental may be employed in *rebuilding* mansion-house (*re Wright's Settled Estates*); but the tenant cannot build a

new mansion-house. A purchaser of settled land acting *bonâ fide* is protected and not obliged to see that any or all of the conditions provided by the Acts have been fulfilled.

The notice to trustees may be a *general* notice (of intention to sell, lease, exchange, or partition, some day), but they may from time to time require *further particulars, or accept shorter notice*, or *waive it* (S. L. A., 1884). In the case of a mortgage the notice must be a *specific* one, as the S. L. A., 1884, does not apply thereto (*re Ray's Settled Estates*). The notice in either case must be given by registered letter, and given also to the solicitor for the trustees (if known), and must be given one month before the tenant acts; there must be *two* trustees, if not then the tenant for life must apply to the Court to appoint the requisite number (S. L. A., 1882, sec. 38). Although *notice* is to be given to the trustees by the tenant for life prior to his exercising the powers conferred by the Acts, no *consent* of either the Court or the trustees is necessary to such exercise of the powers excepting (*a*) to the tenant for life selling, exchanging, or leasing the mansion-house, pleasure grounds, or park, unless the existing mansion-house is used as a farm-house or has not more than 25 acres attached to it, when it may be sold without leave (leave of the Court or consent of trustees necessary, S. L. A., 1890, s. 10); (*b*) to cutting timber if impeachable for waste (leave of the Court or con-

sent of the trustees); (*c*) for sale of settled chattels (leave of the Court *alone* necessary); (*d*) to expenditure of capital money on improvements when the capital money is in Court (leave of the Court); (*e*) leases for longer periods than allowed by the Acts (leave of Court); (*f*) where a person is a tenant for life under a "trader's settlement" (leave of Court).* No notice is required for maximum 21 years' (agricultural or occupation) lease; a three years' agreement to lease may be made not under seal. Rent on a mining lease may vary with current price of minerals (1890), and ordinary tenant for life has one-fourth as rents and profits, or if not impeachable for waste three-fourths. On a building lease there may be peppercorn or nominal rent for first five years. Maximum building lease without special leave is 99 years, mining 60, but such leases for longer terms may be granted with leave of Court, if customary in district, or shorter term difficult to obtain; leases may include options for purchase within 10 years. Even "fee farm rent" (*i.e.* lease in *perpetuity* on payment of ground rent) may thus be sanctioned. Other powers are given by Act, viz. A. to *mortgage* for (i) enfranchisement of copyholds (by purchase of reversion), (ii) equality-money (*i.e.* on exchange or partition), (iii) discharge of incumbrances; B. to *exchange* lands, easements,

* *v.* p. 45.

&c.; C. to *enfranchise* copyholds; D. to *license copyholders* to lease for more than a year; E. to join in *partitioning* settled lands held in community; and F. to sell land and minerals *separately*. A tenant for life cannot, under the Act, mortgage for the purpose of expending money on *improvements*. Money may be expended for this purpose under sec. 30 of the Act on compliance with the provisions and conditions laid down by the Improvement of Land Acts, 1864 to 1899. On sale of copyholds they pass by deed (*without surrender*), which steward must enter on rolls, and admit purchaser.

Any provision in a settlement attempting by forfeiture or gift over of the land or even of other property (*Re Smith*) or otherwise, to prevent exercise of the powers under the Acts is void. The powers are *cumulative* (*i.e.* in addition to any other powers given by the settlement), but in case of conflict between the two, the powers under the Acts prevail (*Re Houghton*). The powers are not assignable,* and remain exercisable by the tenant for life notwithstanding any conveyance of life estate; but, if the tenant convey his life estate for *value*, he cannot exercise these powers so as to affect purchaser's rights without his leave, except that (where

* Except that, under the Execution of Trusts (War Facilities) Act, 1915, he may, by power of attorney, delegate his powers to the trustees of the settlement if he is engaged on war service.

purchaser is not in possession) he can make ordinary and proper leases without such leave.

Several tenants for life of an undivided share,* or even annuitants entitled to *whole* rents of definite portion of estate, make up one tenant for life (*Re Bennet*). If tenant for life or in fee simple is an infant, the powers may be exercised by the *trustee* of the settlement, if none, then by a person appointed by the Court for that purpose (S. L. A., sec. 60). If tenant for life is a married woman entitled for her separate use, she *alone* can exercise the powers; if not for her separate use, *she and her husband* together form the tenant for the purposes of the Acts, and can exercise the powers jointly (S. L. A., sec. 61). If tenant for life is a lunatic, the powers are to be exercised by his *committee* under order of Lord Chancellor or Lords Justices sitting in Lunacy (*re Martha Baggs, re Catherine Salt*, S. L. A., sec. 62). A tenant by curtesy and a tenant after possibility, &c., are tenants for life under the S. L. A.; a dowress is not, although she can grant leases for twenty-one years under the Settled Estates Act, 1877.

Most of the large estates of England are in the hands of tenants for life under "strict settlement." † Apart from these Acts, there is no means of selling such lands or any part of them, however desirable to clear incumbrances, &c.,

* *v.* p. 74. † *v.* p. 43.

except when the tenant in tail is adult and can disentail, or under a power in the settlement. The tenant in tail is generally an infant, and powers in a settlement were usually given to the trustees. The policy of the Acts is to make adult "limited owners" all but absolute owners as to the lands, but not as to the money derived from them.

III.—*Estate Tail.*

An **estate tail** is one limited in its creation to a man and the *heirs of his body*. In a deed these words were formerly essential, but now by C. A., sec. 51, "to A. in tail," "tail male," or "tail female," may be used alternatively (*re Ethel's Contract*). In a will, any words expressing intentions suffice, *e.g.* "to A. and his children," or "issue," &c. It is "general" where any descendant may inherit, according to order of inheritance; * or "qualified," as *tail male*, to male descendants only, *tail female*, to females only (very rare), and *tail special*, as "to A. and the heirs of his body by his wife B.," and by no other wife, or (in a will) "to A. and his issue male and their male descendants," with gift over on failure of such is special *tail male*.

Originally, addition of the phrase "heirs of the body" created a "fee simple *conditional* at

* *v.* p. 64. (Canons 1-4.)

C. L.," *i.e.* a life estate in the donee to be enlarged into fee simple as soon as heritable issue was born, whether or not issue afterwards lived. Such an estate was therefore inalienable beyond life of donee until birth of issue, but afterwards alienable by subinfeudation. But by *De Donis* [*conditionalibus*] (13 Edw. I., 1285) such estate was converted into estate tail (*i.e. taillé*, cut down to *descendants*, excluding *collateral* heirs), and became wholly inalienable. The origin of estates tail was thus about the end of the thirteenth century. They continued inalienable for nearly 200 years, till Edward IV., partly to render great estates accessible to forfeiture for treason, partly to please the mercantile classes by rendering such lands liable for debts, encouraged the bringing of *Taltarum's Case*, 1472—the foundation of Common Recoveries, by which an estate was disentailed. Under Henry VII. and VIII. a less complete disentail by fine was introduced.

A common recovery was a fictitious suit carried to judgment. The chief *actores fabulæ* were the "tenant to the *præcipe*" and the "demandant," the second destined to play plaintiff against the first as defendant. A freehold estate in possession was conveyed to the first by tenant in tail, if in possession, or by him and tenant for life, if this last was in possession. The demandant sued tenant to the *præcipe*, who then "vouched to warranty" tenant in tail (*i.e.* called on him to show that he had a good title to convey), who in

turn vouched the "common vouchee" (generally the Court crier), who took care to disappear for the time, whereupon the Court gave judgment for plaintiff, and ordered the faithless vouchee to find other lands of equal value for the luckless issue of tenant in tail, remaindermen, and reversioner. The vouchee had not any such lands, so the issue, &c., went without, while the successful demandant was bound by a "deed to lead uses" to take the lands for or as directed by tenant in tail, who thus got full power over them (*i.e.* to hold them in fee simple or convey them to a purchaser). This rigmarole admitted of infinite varieties, and raised many subtle difficulties, *e.g.* "whether a Papist 'could suffer a common recovery,'" "whether disentailment of New River shares required separate recovery for every county through which the New River runs," &c.

A Fine was a fictitious action compromised by leave of Court. The end (*finis*) of it was to bar issue, but *not* remainder or reversion, and it was "levied with proclamations" (*i.e.* proclaimed once in each term for a year in open Court). Instead of fee simple, it created a "*base* fee," lasting only as long as there were issue of tenant in tail, but allowing a remainderman or reversioner to come in upon the extinction of such issue. The Fines and Recoveries Abolition Act, 1833, abolished all these fictitious proceedings, and substituted a deed (known as a "disentailing assurance") to be enrolled within six months of

execution at the C. O. of the High Court of Justice, which may (*a*) convey the now disentailed land to a purchaser, or (*b*), through a grantee to uses,* to tenant in tail himself in fee simple or in base fee. But in either (*a*) the first existing tenant for life *under the settlement*, or (*b*) by express provision in the settlement deed, three or less *in esse* jointly (usually the trustees, but must not be a bare trustee or dowress), form a "protector of the settlement," and without his assent, in the same or another previous or cotemporaneous deed with the disentailing assurance and also enrolled, only a *base fee* (as formerly by Fine) can be created. Therefore fee simple absolute (as formerly by Recovery) can be created out of fee tail in three ways, *first*, by tenant in tail in remainder with consent of protector, whether tenant for life or other or others; *secondly*, by tenant in tail in possession after death of tenant for life with consent of other or others forming protector; *thirdly*, by tenant in tail in possession alone, when there is no protector.

A base fee is "enlarged" into fee simple (*a*) by the ex-tenant in tail executing a subsequent deed enrolled with consent of protector (if any); (*b*) *ipso facto* by the base fee and immediate remainder or reversion in fee being united in the same holder (*e.g.* if the reversion is sold or devised to one who has already purchased the base fee);

* *v.* p. 211.

(*c*) under R. P. L. A., 1874, by twelve years' uninterrupted possession of the base fee after death of the protector.

In three exceptional cases an estate tail cannot be barred:—(i) tenancy in tail after possibility of issue extinct, arising out of tail special and death of the particular wife without issue, such an estate being practically reduced to a tenancy for life; (ii) estates tail granted by the Crown for specified or presumed public services, the reversion being in the Crown (*e.g.* Dukes of Marlborough and Wellington); (iii) in very rare cases by private Acts (*e.g.* Shrewsbury estates).

Tenant in tail in possession being competent to make himself absolute owner is naturally not liable for waste, except that tenant in tail after possibility, &c., is liable for *equitable* waste. The land is liable in his hands for *judgment* debts, if delivered in execution in his *lifetime* (*i.e.* by writ of *elegit* delivered to sheriff, or "equitable execution" by appointment of a receiver). It may now be taken that it does *not* by L. T. A. vest in personal representative and so become liable to *all* debts. But it is liable to Crown debts (both in lifetime and as assets after decease of debtor) provided a "writ of extent" has been registered.

Under S. L. A. a tenant in tail *in possession* has the powers of a tenant for life under the Act. Hence he can at his option (i) sell as tenant for life under the Acts, *preserving* the settlement

and merely substituting capital money for the land, or (ii) disentail, *destroying* the settlement altogether and becoming absolute owner of the land or its value.

"Strict settlement" is the usual system of "tying up" large estates for as long a time as the law allows, by giving life estates to all living persons and estates tail in remainder thereafter to their unborn sons (or sons first and afterwards daughters) which may be made to vest at birth or at twenty-one. Thus, if made at marriage of eldest son, life estate is reserved to his father; remainder for life to himself; remainder in tail to *his* eldest son; in default of issue of such son, in tail to his second son, &c., along with provisions for jointures for widows and portions for younger children. When a tenant in tail attains twenty-one he is usually offered an allowance to be charged on the land, if he will bar the entail and join in the re-settlement by which *he* shall become mere tenant for life, and *his* (unborn) son tenant in tail. Thus no particular settlement lasts much longer than a life or lives in being and twenty-one years after; it then gives way to a new one, and no tenancy in tail falls into possession; no part of the land can ever pass out of the family, except either by sale by tenant for life under S. L. A., or by the united disentailing action of tenant for life and his son; in the former case the value, as capital money, continues to represent the land;

the latter cannot happen unless prudence or improvidence overmasters pride of family in both father and son; meanwhile incumbrances in the shape of jointures, portions, rent-charges, &c., are accumulating, and the land ceases to be profitable to its nominal owners unless backed up by large personalty.

Quasi-entail is estate *pur autre vie* limited to grantee and heirs of his body. It is not an estate tail and consequently not within *De Donis;* it is, however, barred by conveyance without enrolment, but if preceded by life estate, consent of tenant for life is required to defeat *subsequent* remainders.

Copyholds also are not within *De Donis*, and there is no entail in them, except by special custom. Estate in copyholds "to A. and heirs of his body" in a manor where there is no such custom raises fee simple *conditional* on birth of issue, freely alienable after such birth. Where there is special custom of entail, estate tail, if *legal* (*i.e.* vested in beneficiary himself), is barred by surrender enrolled on rolls of manor; if *equitable* (*i.e.* vested in trustee for beneficiary), it is barred (i) by *deed* enrolled in manor or (ii) by *surrender*. The latter is contrary to principle, as trustee, not beneficiary, is the nominal copyhold tenant, but it is authorized by Fine and Recoveries Act. Consent of protector, when required, may be given by (*a*) deed previous or

cotemporaneous enrolled in manor, or (*b*) concurrence at date of surrender similarly enrolled.

Personalty (*e.g.* leaseholds, consols, chattels), not being within *De Donis*, does not admit of estate tail. A grant or devise, *e.g.* of leaseholds to A. and the heirs of his body, vests them in A. absolutely (*Leventhorpe* v. *Ashbie*); if, however, the grant was of a *personal* annuity, A. would take a conditional fee only therein. Where personalty is comprised in a "strict settlement," the utmost possible by way of "tying it up" is to settle it on trusts to correspond with the freeholds, but so as not to vest absolutely in any tenant in tail *by purchase* till twenty-one, on death thereunder to devolve as the freeholds do. The phrase "by purchase" confines the limitation to those who take under the settlement, and brings the vesting within the period allowed by the Rule against perpetuities; * the eldest son on attaining twenty-one will become absolutely entitled to the chattels. Personalty is also sometimes (especially in a will) settled by trust for sale and re-investment in freeholds to be settled like other settled freeholds, with power to postpone sale, and directions for interim enjoyment by persons entitled to the freeholds.

Non-strict settlement or "trader's settlement" is a convenient term for limitations (generally by will of small estates in land or house) by way of

* *v.* p. 54.

trust for sale for benefit of testator's widow for life, and afterwards for equal division among children. It is, in fact, the typical will of the professional or business man who owns town or suburban house. But it falls within S. L. A., sec. 63. This raises difficulties in reconciling two concurrent powers of sale, viz. statutory *power* of widow as tenant for life, and *power clothed with a trust* of trustees. By S. L. A. the former should prevail. This being found inconvenient, by S. L. A., 1884, it was enacted that (i) trustees in such case may sell *without consent of tenant for life;* (ii) such tenant for life may not exercise statutory powers *without order of Court;* (iii) such order may be registered as *lis pendens*, which is notice to all the world that powers of trustees are for time being suspended.

It may be observed that estate tail is the one purely Norman estate. Proposals have been made to abolish *all* settlements of land. There is, however, a great deal to be said for retaining power of creating a life estate, especially in case of a widow.

IV.—*Estate in Fee Simple.*

An estate in **fee simple** is one limited in its creation to a man *and his heirs*. In a deed these words were formerly essential, but now by C. A., sec. 51, "to A. in fee simple" may be used

alternatively. (But a grant by deed "to A. in fee" or "to A. absolutely" would carry a life estate only. *Re Ethel and Mitchell's Contract* (1901), 1 Ch. 945.) In a will since W. A. (not before), a simple devise of Blackacre to A., *without* any words of limitation, carries fee simple, provided the testator was seised in fee. So, too, *a fortiori*, if land was devised to A. in fee or to A. absolutely. A grant in a deed "to A. and his heirs *male*" carries fee simple, the word "male" being mere surplusage, but a devise in a will "to A. and his heirs male" would sufficiently import the intention of giving an estate in *tail male*. An equitable estate in fee simple may be created by deed by any words clearly showing intention, *e.g.* "grant unto and to the use of X. in fee simple in trust for Y. for life remainder in trust for Z. absolutely" would give Z. an equitable estate in fee simple. The two characteristics of fee simple are (i) that it descends on intestacy to heir or heirs, whether lineal or collateral, male or female, subject now, however, to conveyance by administrator or order of Court; (ii) that tenant has unfettered power of alienation *inter vivos* or by will. Hence it is the highest estate known to the law, and nearest approach to absolute ownership in land, tenant being limited in his enjoyment only by general policy of law in favour of society, by his own covenants, and by former *restrictive* covenants of which he has actual or constructive notice, *e.g.* not to build,

&c. (*Haywood* v. *Brunswick Building Society*), and by conditions subsequent that may abridge or determine his estate. If the estate is in freeholds, he is not liable for waste, unless there is executory devise or shifting use over, when he is liable for equitable waste only. In copyholds he is liable, and remains so as to minerals, even when they are enfranchised. If lands are held of a manor, even a freeholder may be liable to chief-rents and heriots.

Estates in fee simple were perhaps at first alienable only by the lord's consent. Later they were by *subinfeudation*, grantee holding of grantor, as he in turn held of Crown or mesne lord. But *Quia Emptores* (18 Edw. I., 1290) abolished subinfeudation, and allowed tenant in fee to alienate *inter vivos* to grantee who should hold of superior lord, and not of grantor. Generally, the superior lord has now disappeared, and tenant in fee holds of Crown, except where lands are parcel of a manor, which must be as old as *Quia Emptores*.

In addition to an ordinary or "absolute" fee simple there are (i) fee "qualified" or "base," and (ii) fee "conditional." (i) is subject to some qualification required (a) of the tenant or his heirs, or (b) of the circumstances under which they hold. (i a) appears to be obsolete, except as preceding executory interests;* an ordinary

* *v.* p. 90.

"base fee," arising out of imperfect barring of an estate tail, is an instance of (i b): an estate "to A. and the heirs of his body" in freeholds before *De Donis*, or now in copyholds of a manor where there is no custom to entail, is an example of (ii); mortgagee's estate was also formerly so described.

The unfettered power of alienation secured to tenant in fee simple by *Quia Emptores* was at first only *inter vivos*.

As to alienation by *will*, the history of devise of land may be summed up under six heads:— (1) Power of devise existed in *Saxon* times; (2) it was abolished under the feudal system, except by *Local Custom* in the city of London, in Gavelkind in Kent, a few Burgage tenure lands near Winchester, and some other places; (3) under the later Plantagenets it became usual to convey lands *inter vivos* to the *Uses* to be declared by will with "resulting use" for feoffor himself during his lifetime; (4) St. of Uses (27 Hen. VIII., 1535) executed the use and turned these uses into legal estates not devisable, St. of Wills (32 Hen. VIII., 1540) made all lands in Common Socage devisable and lands in Knight Service as to two-thirds; (5) St. of Tenures (12 Car. II., 1660), by abolishing Knight Service and turning it into Common Socage, made all lands devisable; (6) St. of Frauds, 1677, made estates *pur autre vie*, whether or not expressed to be of inheritance, devisable. The old Statute of Wills is repealed,

but its provisions practically re-enacted by the W. A.

Copyholds held in fee simple are conveyed by Surrender and Admittance *inter vivos*, and by Will entitling devisee to admittance, and since 55 Geo. III., 1815, it is not necessary for the testator previously to surrender to the use of his will.

The general policy of the Law places certain restraints on alienation of fee simple:—regarding (1) *Corporation*, (2) *Charities*, (3) *Fraud on Creditors*, (4) *Fraud on Purchaser*, (5) *Superstitious Uses*, (6) *Perpetuities*, (7) *Accumulation*.

1. *Corporations* cannot hold land except by licence of Crown, being forbidden by Statutes of Mortmain to do so directly (*Magna Charta*, 1225, and 7 Edw. I.) or by way of use (15 Rich. II., 1391), and now by Mortmain Act, 1888, Part I.; conveyance to corporation not so licensed, works forfeiture to Crown or other superior lord. Licence may regard specific lands, or be general, and is given by charter or statutory powers in public or private Act. Under Charitable Trusts Acts, 1853, &c., charity trustees may be incorporated, and may then hold lands without further licence in mortmain. Registered companies under Companies Acts, 1862 to 1908, for acquisition of gain may hold lands for the purposes of the company; companies for other purposes may hold two acres without, and more with, sanction

of Board of Trade. By Public Health Act, 1875, Municipal Corporations Act, 1882, Local Government Acts, 1888 and 1894, &c., County Councils, County and Non-County Municipal Boroughs, and Urban and Rural authorities may hold lands for the purposes of the Acts, and by Commons Act, 1899, a District Council may acquire the fee of a public common. Railway, Tramway, Gas, Water Companies, &c., usually hold under the powers of their private Acts. In grants to corporations sole the words "his successors" take the place of "his heirs." In grants to corporations aggregate no words of limitation are necessary.

2. *Charities.* By Mortmain and Charitable Uses Act, 1888, Part II., repealing but substantially re-enacting the so-called "Mortmain Act," 1736, and codifying various later Acts, every assurance of land, or of personalty to be laid out in land, for *charitable uses* is forbidden, except (1) *bonâ fide* conveyances made with proper formalities for *full value* (including thereunder rent reserved) and (2) *gifts* made in accordance with the act, *i.e.* by *deed* with two attesting witnesses at least twelve months before donor's death, and enrolled in C. O. within six months after execution, to take effect in possession, without reservation or power of revocation. Conveyance for *value* may be within twelve months before death. Stock given for buying land must be transferred at least six months before death.

But various charities are by this and other Acts exempted from these restrictions, *e.g.* the English Universities and their Colleges; Eton, Winchester, and Westminster; British Museum, Greenwich Hospital, &c.; Dwellings for Working Classes Act (1890); gift to trustees of society for purposes of religion, art, literature, or science, up to 2 acres, or building for such purposes; public park up to 20 acres, museum 2 acres, elementary schoolhouse 1 acre (Mortmain Act, 1888, Part III.), and public gymnasium held by local authority (Mortmain Act, 1891). These three last amounts of land may also be devised by *will* twelve months before, enrolled with Charity Commissioners six months after, death. Charity moneys may by Act of 1870 be invested on mortgage of land. By Mortmain Act, 1891, *any devise* to a charity is good, but the land must be sold within twelve months after death, or later by the Charity Commissioners, unless an order of Court direct the contrary, which is only granted when the land is required for actual *occupation* by the Charity and not as an investment. Legacy of stock or money for buying land is good as legacy, if *not* laid out in land. "Impure personalty" (*i.e.* money derived from sale of land, or secured on land) is *not* to be deemed land, and may therefore be bequeathed to charities. This Act applies to the wills of testators dying after 1891, even though the will was executed prior to this date (*re Bridger*). By

the Mortmain Act, 1892, land may be conveyed to any local authority for any legal purpose free from any formalities except that the deed, if voluntary, must be enrolled with the Charity Commissioners six months after execution.

3. *Fraud on Creditors.* By 13 Eliz. c. 5, any conveyance of property (including lands), not on "good consideration" and *bonâ fide*, with *intent* to delay or defraud creditors, is voidable at instance of creditors who can show that settlor, either by being heavily embarrassed at date of settlement, or otherwise, must be taken to have intended fraud; a voluntary transference is presumed to be made with the object of defeating creditors in the absence of rebutting evidence (*Freeman* v. *Pope*). By Bankruptcy Act, 1914, sec. 42, any *voluntary* settlement is void (1) if settlor become bankrupt within *two* years, or (2) if within *ten* years, then unless the parties claiming thereunder prove (a) that at its date settlor was solvent without aid of property settled, *and* (b) that settlor's interest therein passed on execution to trustee of the settlement. The settlement, however, is not void *ab initio*, but from time trustee in bankruptcy took possession, thus protecting an intermediate purchaser (*Carter* v. *Kenderdine*); and (apart from statutes) though A. may settle property on B. *until* bankruptcy, &c., with gift over thereon, B. cannot so settle property on himself.

4. *Fraud on Purchaser.* By the judicial construction put on 27 Eliz. c. 4, it was held that any *voluntary* settlement of *land* was void as against a subsequent purchaser for value (buyer, mortgagee, &c.) *with* as well as *without* notice of previous gift. But by Voluntary Assurances Act, 1893, such voluntary conveyance is now valid, if *bonâ fide* and without fraudulent intent.

5. *Superstitious Uses.* These are gifts for purposes which Law deems beneficial neither to particular person or class, nor to general public (but gift for saying of masses for the soul is valid. *Bourne* v. *Keane*).

6. *Perpetuities.* The general principle of Law (wholly apart from St.) is to forbid the "tying up" of property so as to render it *inalienable* for more than a life or lives in being and twenty-one years. Or (to express the rule affirmatively), any instrument providing for future destination of property, real or personal, must so provide that *in any case* it shall ultimately vest under the instrument within a life or lives in being and twenty-one years afterwards, with a further period for gestation where it actually exists. (*Cadell* v. *Palmer.*) Any limitation infringing this rule is "void for remoteness" *in toto*. The chief application of the rule is to affect Executory Interests,* and it was probably framed for that purpose when they first became common.

* *v.* p. 90.

It does not prevent creation of estate tail or limitations subsequent thereto, because both it and they may always be destroyed by disentail. Moreover rule of perpetuities does not apply to (1) limitations over from one charity to another, (2) provisions by deed or will for paying off debts of the settlor, (3) the statutory powers conferred by C. A., 1881, or like powers conferred by any instrument, to the holder of a rent charge for recovering or compelling payment of the same (C. A. 1911). Where the rule does apply, any limitation which may *possibly* be too remote (whether or not in the event it happens so to turn out), and every subsequent limitation depending thereon, are *wholly* void; *e.g.* "devise in trust for A. for life, and after his decease for such of his children as shall attain the age of twenty-one, to vest in them respectively at that age," is good: but "devise in trust for A. for life, and after his decease for such of his children and *grandchildren*," &c., would be bad, though all the children *must*, and all the grandchildren *might*, attain their majority within twenty-one years after A.'s death; because some of the latter might not. Therefore entire gift to the *class* formed of children and grandchildren would fail.

7. *Accumulation.* By Accumulations (or "Thellusson") Act, 1800, no accumulation of rents or property, real or personal, may by any instrument be directed for longer than one *or*

other (and *one* only) of these four periods, viz. (1) life of settlor, or (2) twenty-one years after, or (3) minority of any person *in esse* at death of settlor or testator, or (4) minority of any person who, if of full age, would under the deed or will be entitled to rents and profits. The meaning of (4) is now decided to be that accumulation may be directed to *begin* at *birth* of devisee or legatee not *in esse* at death of settlor or testator (*Re Cattell*). Any accumulation exceeding the lawful period is bad only for the *excess* (not *in toto* as under the Perpetuity rule which under a will lapses to residuary devisee, if any; if none, to heir. There are four exceptions to which the Act does not apply: viz. (1) provisions for payment of *debts* of settlor *or any other person*, (2) raising *portions* for younger children, (3) touching produce of *timber*, (4) raising a fund to keep property in good repair. If the accumulation is directed for *purchase of land*, it must not, by Accumulations Act, 1892, exceed minority of person entitled.

Such are the chief restraints on alienation imposed by Law. On the other hand, any attempt at *general* restraint of alienation by condition annexed to grant or devise of estate of freehold is void for "repugnancy," for grantor "cannot derogate from his own grant."

Alienation of fee simple, whole or partial, is (I.) by **operation of Law,** (II.) by **act of tenant.** (I.) may be (a) by *Bankruptcy*, when the estate

vests in trustee in bankruptcy for benefit of creditors by Bankruptcy Acts, 1883 to 1914; (b) by *Marriage*, when at C. L. fee simple estate of a woman passes beneficially to her husband, who gains a freehold estate therein during coverture with inchoate right to "curtesy"—a rare occurrence since M. W. P. A.; (c) by *Execution* by *elegit*, with or without subsequent sale; (d) by *Administration* with order for sale for payment of debts of deceased tenant.

(II.) may be either *inter vivos*, and this (a) by *Sale*, (b) by *Gift*, (c) by *Mortgage*, (d) by *Settlement* creating lesser estates out of fee simple, with or without reservation to the settlor himself: or by Devise.

Under statutes, ranging from Statute of Westminster the Second (13 Edw. I.) down to Land Charges Act, 1900, land may be "taken in execution" to satisfy a judgment debt. The creditor may (i) become "Tenant by *Elegit*," and recoup himself out of *rents* and *profits*, or (ii) may, and generally will, after *registering* writ in the Land Registry, obtain an order, on petition to Ch. D., for *sale* of the lands. Where debtor's interest in land is of a kind that cannot be taken under *elegit*, creditor may (iii) have "Equitable execution" by appointment of a *Receiver* The "return to the writ" of *elegit*, or appointment of a receiver, alike constitutes "delivery in execution" and "*binds* the land," *i.e.* creditor's rights prevail over any *subsequent* purchaser for value.

Crown debts are recoverable by "writ of *extent*," which, by Crown Suits Act, 1865, on registration, binds lands of debtor. On death of a debtor seised of fee simple, his lands are by Administration of Estates Act, s. 33, assets for payment of his debts, *after* personalty is exhausted. He may, however, by his will or otherwise, *charge* all or some debts on his lands *equally* with or in *exoneration* of personalty, but cannot exclude either from liability in case of insufficiency. By Administration of Estates ("Hinde Palmer's") Act, 1869, Specialty creditors have no priority over Simple contract creditors, both in administration being paid *pari passu*. *Secured* creditors, *i.e.* those who hold some specific charge on lands of deceased *insolvent*, by J. A., 1875, s. 10, are subject to Bankruptcy rule, by which they may (1) *keep* their security without proving, or (2) *give it up* and prove for the whole debt, or (3) *realize* or *value* it and prove for the balance, subject in latter case to giving it up at their own valuation. By Land Transfer Act, 1897, fee simple lands pass on death of owner to his executors or administrators who can sell them for payment of his debts.

A *lis pendens*, *i.e.* action affecting title to land, may also be *registered*, whereby any subsequent purchaser is affected with *notice* equally as by express notice. The registration may be "vacated" on proper application to the Court.

Persons under "disability" (Infants, Lunatics, Married Women, Convicts) are under complete or partial incapacity of alienation. The will of an Infant is *void* (unless he is a soldier in actual military service, or mariner at sea, or a member of H.M.'s naval or marine forces at sea or engaged in what would be considered actual military service if he were a soldier (Wills (Soldiers and Sailors) Act, 1918), and his conveyance generally *voidable* (*Edwards* v. *Carter*). But valid alienation of his land may be made (1) by infant himself, if 15 years old, conveying *gavelkind* lands by *feoffment* (*re Maskell and Goldfinch's Contract*); (2) by order of Court for *payment of debts* of testator who devised lands to infant; (3) on *marriage settlement* with sanction of Chancery Division, where male infant is 20, or female infant is 17 (Infants' Settlement Act, 1855); (4) under S. L. A., sec. 59, by *trustees;* also under the Settled Estates Act, 1877, and C. A., 1881, an infant's land may be authorized by the Court to be sold; (5) under T. A., by "Vesting Order" in case of *infant trustee* or *mortgagee;* (6) under Lands Clauses Act, 1845, an infant's lands are conveyed to the promoters under the Act by his guardian. On sale of lands to an infant the conveyance is voidable (*Valentini* v. *Canali*).

Conveyance by a Lunatic to *bonâ fide* purchaser, if for value *without* notice of lunacy, is probably *valid* and *with* notice *voidable* (*Molton*

v. *Camroux*). Valid conveyance may in latter case be made by Judge in Lunacy, or committee or such person as Judge in Lunacy may direct, acting under his direction, under Lunacy Acts, 1890 and 1908, where (1) alienation is necessary for *benefit of others*, *e.g.* creditors; or (2) unless alienation be allowed, estate of lunatic would *seriously suffer;* (3) where lands taken under Lands Clauses Act, 1845; (4) under S. L. A., sec. 62, see *ante*. If a lunatic is a trustee of land, the land can be vested in such persons and for such estate as shall be directed by the High Court (Lunacy Act, 1911). A sale to a lunatic if *bonâ fide* is *valid* by vendor unaware of his insanity.

A Convict, by Abolition of Attainder Act, 1870, cannot, after *sentence* of death or penal servitude for *treason* or *felony*, alienate lands, but they may be conveyed for benefit of convict's estate by Crown *Administrator*, who, however, has no power to disentail his lands in fee tail (*Re Gaskell & Walter's Contract*). If the lands are trust property, or of which he is mortgagee, they remain vested in himself personally (*Re Levy*). Aliens, since 1870, can hold any estate in land in like manner as subjects.

The fee simple (or other freehold) of a Married Woman may be to her *separate use* under (1) M. W. P. A., 1882; or (2) settlement, grant, or will to that effect, (a) *with*, or (b) *without*, *restraint on anticipation*, and (i) vested in herself

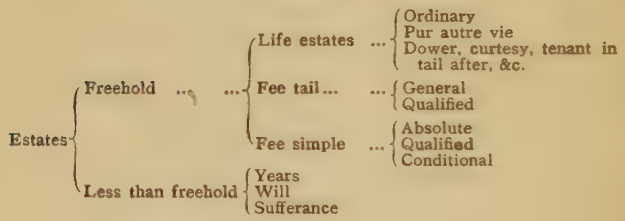
(*legal* estate), or (ii) vested in trustees for her (*equitable* estate). As to (1), she can alienate both legal and equitable (or beneficial) interest by ordinary deed as though she were *feme sole.* As to (2), if restrained from anticipation she cannot, of course, alienate so as to deprive herself of the income, except with permission of the Court under C. A., 1911, sec. 7, replacing C. A., 1881, sec. 39, when such sale is for her benefit and she agrees.* If not so restrained, she can alone convey *equitable* interest (*Taylor* v. *Meads*); and she and her *husband* by "deed acknowledged" under Fines and Recoveries Act, 1833, as amended by C. A., 1882, in case (i), or she and her *trustees* by ordinary deed in case (ii), can convey *legal* estate.

If her fee (or other freehold) is not to her separate use (*e.g.* if it vested in her after marriage, but before Jan. 1, 1883), her husband has by C. L. a freehold estate during coverture, carrying right to rents and profits, and neither he nor she can devise the land. By Fines and Recoveries Act, instead of a fine, a deed *acknowledged* after *separate examination* of the wife, with *concurrence* of the husband, is the means of conveying such lands. The separate examination must be before a Judge, or (since C. A., 1882) *one* commissioner.

* If an annuity is given by will to a married woman with restraint on anticipation, she can disclaim the annuity in spite of the restraint. (*Re Wimperis.*)

Interests **LESS THAN FREEHOLD,** being "*Chattel* interests in land," and therefore personalty, will be deferred to chapter ix.; and we now proceed to devolution of fee (whether *simple* or *tail*) on intestacy. As an "investitive fact" by which a successor acquires title to property, Devolution might be considered at a later stage; but as involved in the very idea of estates of *inheritance*, it will be more conveniently considered here.

TABLE C.



CHAPTER IV.

DEVOLUTION.

* *Refer to Table D on page 73.*

On intestacy of tenant of an estate of inheritance his real estate formerly devolved directly on the person who at his death was his heir. But on death of intestate since 1897, his **FEE SIMPLE IN FREEHOLDS** now by L. T. A., 1897, vests in his **administrator,** by whose conveyance or by Order of Court made after one year from death it passes (after payment of debts thereout, if necessary) to his heir; **COPYHOLDS** and **CUSTOMARY FREEHOLD** are not within the L. T. A., consequently they still vest *directly* in the heir or customary heir. The heir is an uncertain person till death of *propositus*, for *Deus, non homo, hæredem facit* (God, not man, chooseth the heir), and *Nemo est hæres viventis* (no one is heir to a living person). Yet we speak of "*expectant* heirs": viz. an "heir *apparent,*" who must succeed if he outlives his ancestor, *i.e.* an eldest son; and an "heir *presumptive,*" who must succeed if the predecessor die before any nearer heir is born and survives, *e.g.* a female only child, brother, nephew, &c. An heir is

none the less heir though all land be devised to another. He is ready to take, if the devise wholly or partially fails. If the land be devised to him, he is both *heir* and *devisee*, but takes as devisee, *i.e.* by "*purchase* and not by *descent*." A "Purchaser" is a person acquiring lands in any way except by descent on intestacy, escheat, enclosure, or partition. Besides heir, the wife or husband of deceased may have certain estates in land (*see* Dower and Curtesy, *infra*).

Descent or Inheritance depends originally on *General Custom* (together with customs of Gavelkind and Borough English), but as to freeholds and copyholds of manors frequently on *Particular Custom*. The general custom as to freeholds, and as to copyholds so far as no custom of the manor is proved to the contrary, is now embodied with important alterations in Inheritance Act, 1833, together with a clause in L. P. A. A. (Lord St. Leonard's Act), 1859, which is to be read into the former Act. The Canons of Descent may be stated as eight:—

(1) Descent to be traced from *last purchaser*, and not as formerly, according to maxim *Seisina facit stipitem* (Seisin makes the heir), from last person actually seised. If A. devises his property to his eldest son who dies intestate, the son and not A. is the *propositus*, he being the last "purchaser."

(2) To lineal issue *in infinitum;*

(3) *Males* being preferred to females, *primogeniture* among males, *coporcenary* (*i.e.* community of inheritance) among females;

(4) Remoter lineal issue "*representing*" their own parents and taking *per stirpes* (Canons 1-4 obviously exhaust descent of estate tail);

By *per stirpes* (by the stocks) is meant that the person claims as "*representing*" his or her parent and not in his or her *own right* (*per capita*), *e.g.* X. dies intestate leaving B., C., D. daughters and E., F. granddaughters (*i.e.* daughters of a deceased daughter of X.), B., C., D. take *per capita* in their own right, whereas E. and F. take *per stirpes* as representing their deceased mother.

(5) *Nearest ancestor* taking on failure of lineal issue (not as formerly, collaterals);

(6) The father and all the male paternal ancestors of the purchaser and their descendants being preferred to any of the female paternal ancestors and their heirs, and all female paternal ancestors and their heirs before the mother of the last purchaser or any of the male maternal ancestors and their descendants; and the mother and male maternal ancestors and their descendants before any of the female maternal ancestors and their heirs.

(7) *Issue of ancestors* representing such ancestors, *half-blood* taking next after kinsman of whole blood of same degree and such kins-

man's issue when common ancestor is a male and next after common ancestor when common ancestor is a female.

(8) Mother of more remote male paternal ancestor and her heirs being preferred to mother of less remote male paternal ancestor and her heirs; and mother of more remote male maternal ancestor and her heirs being preferred to a mother of less remote male maternal ancestor and her heirs.

The principal changes by statute are in (1), (5), (7). Bracton and Coke thought it quite natural that land, being *heavy*, should never "ascend" to an ancestor, even to a father! Among collaterals half-blood could not inherit before the Act. Now a half-brother on father's side inherits after sisters of whole blood and their issue, while a half-brother on the mother's side inherits next after mother herself.

The L. P. A. A., 1859, created a new canon of descent, viz. where there is a *total failure of heirs*, lineal and collateral, descent is to be traced from the person *last entitled*.

To illustrate the provision of L. P. A. A.: if A. buy land, and it descends to his only child B., who dies intestate and childless, A. is the *purchaser*, but if no heirs of his exist, B. being person last entitled, the land devolves on nearest relation of B.'s on his *mother's* side.

A posthumous child takes by descent from his

birth only: it may be noticed that he can also take a *devise* (*Reeve* v. *Long*), and a remainder under *settlement* by an Act of Will. III.

If the land is **copyhold** the above canons of descent apply except so far as they are varied by the custom of the particular manor. If the lands are of **Gavelkind** tenure, or **Burgage** tenure, then the canons are varied to admit of the particular incidents of these tenures.

Estates of inheritance on descent may be subject to **DOWER,** *i.e.* a widow's life estate in *one-third* (in gavelkind one-half) of husband's freeholds of inheritance in *possession* not held in *joint-tenancy,* on his death during a *subsisting* marriage, provided her *issue* would be *heritable.* The second wife of tenant in tail special is not dowable, for her issue would not be heritable. Issue, however, need not be actually born, "*possibility* of issue" being sufficient. "**Common Law Dower**" attached (i) to lands only in which husband was seised of a *legal* estate, but (ii) to all such lands of which he was seised at *any time during coverture.* "**Statutory Dower**" created by Dower Act, 1833, is (i) extended to *equitable* estate, but (ii) confined to lands of which husband is seised at his death not otherwise disposed of. It does not attach to remainder or reversion on freehold estate, but does attach to every form of estate in community except joint-tenancy. Divorce destroys subsisting marriage.

Dower is barred by (*a*) *jointure*, *i.e.* legal or equitable estate, or personalty accepted *before* marriage in substitution, or given *after* marriage, in which case the widow has the right to *elect* between taking jointure or claiming dower; (*b*) any *declaration* negativing the widow's right to dower or *disposition* of lands by husband in deed or will; (*c*) "*Uses to bar dower*" in case of those married before Dower Act* whereby the husband never obtained a "legal estate" in the lands to which dower could attach, the power of appointment, however, which was always included, enabling him to exercise full control over the lands.

Land may be subject to **CURTESY** (of England), *i.e.* widower's life estate in *whole* (in gavelind one-half till re-marriage) of wife's *freeholds of inheritance in possession*, *legal* or *equitable*, not in joint-tenancy, on her death during subsisting marriage, provided heritable issue have been actually *born alive* (this last not necessary in gavelkind). On birth of heritable issue husband is tenant by **curtesy initiate** which becomes **consummate** on wife's death. Since the passing of the Married Women's Property Act, 1882, it only attaches to lands of which the wife dies *intestate*. Tenant by curtesy has powers of tenant for life under S. L. A., his estate by S. L. A., 1884, being deemed to arise by wife's

* *v.* p. 100.

settlement, even though it comes actually under her intestacy. A dowress is *not* tenant for life under S. L. A. Neither dower nor curtesy commonly occurs, as settlements or wills usually make other arrangements.

There is neither dower nor curtesy by General Custom in copyholds. Curtesy may exist by special custom. By special custom there may be an equivalent of dower, called "**Freebench**" in copyholds, and "**Customary Dower**" in customary freeholds. The Dower Act does not apply, but **freebench** usually attaches only to lands of which husband is seised *at his death*, except in a very few manors (perhaps only Cheltenham, Hemel Hempstead, and Hexham for copyholds, and one or two others for customary freeholds), where it attaches to all lands of husband *during coverture*. **Freebench** amounts only to a third in some manors, and varies between a third and the whole in others.

Where the wife has an estate of inheritance to her *separate use*, the husband takes by curtesy, if she has not alienated it (*Hope* v. *Hope*).

An estate of Dower or Curtesy may be registered in the Land Registry under the Land Transfer Acts, 1875 and 1897, and if so registered is an incumbrance appearing on the register.

The Canons of Descent do not now apply to devolution of **a trust or mortgage estate of**

freeholds, which on death of sole or last surviving trustee or mortgagee by C. A., sect. 30, vests in his personal representatives "as if the same were a chattel real"; but now on intestacy it probably vests in heir until appointment of administrator (*Re Pilling's Trusts*). Such an estate of *copyholds* or *customary freeholds* by Cop. A. vests in the heir or *customary heir* as the C. A. does not apply. Heir of tenancy *pur autre vie* is sometimes said to take "descendible freehold" rather than fee.

"Estates less than freehold," *i.e.* Leaseholds or Chattels real, if not a mere "dry" legal estate of a trustee (*i.e.* if leaseholder had the beneficial interest), like other personalty, vest in administrator of intestate for payment of debts, and thereafter for distribution among the next-of-kin (*subject to widow's right to one-third if husband has left issue, or one-half of he has not*) according to the Statutes of Distribution of Car. II., 1670, and Jac. II., 1685, viz. (1) to children and remoter issue *per stirpes*, any "advancement" in lifetime being "brought into hotchpot" or reckoned in; (2) to father solely, excluding mother, brothers, and sisters; (3) to mother, brothers, and sisters *equally* (half-blood equally with whole blood), *children* of deceased brothers and sisters representing *per stirpes* (but not *remoter issue, re Natt*); (4) mother, brothers, or sisters and children of deceased brother or sister when intestate has left mother, brother or

sister surviving him take in priority to grandfather or grandmother, but if intestate has no issue, parents, brothers or sisters surviving him, his grandparents take in priority to his nephews or nieces; (5) nephews and nieces (taking in their own right), uncles and aunts *per capita*, *e.g.* if intestate leaves a nephew, child of his brother, two nieces children of his sister, and two grand-nephews children of a nephew, and an uncle; the estate will be divided into four equal parts, the uncle taking one, the nephew taking one and the two nieces one part each *per capita*, the grand-nephews are ignored (*Cooper* v. *France*); (6) if no uncles, aunts, nephews, or nieces, remoter kin succeed, according to nearness of degree, *per capita*, *e.g.* first cousins, great-uncles, great-aunts, grand-nephews and grand-nieces, being all in the 4th degree to the intestate, would share equally; (7) if no next-of-kin, Crown takes as *bona vacantia*. As to right of husband or wife of the intestate the husband takes in priority to children or any other relation, this by the **Statute of Frauds, 1677,** and not by the Statute of Distributions; the widow, if intestate leaves issue, takes one-third; if no issue, widow under Intestates' Estate Act, 1890, takes £500 (if estate does not amount to so much, then she takes the whole of it); the remainder is divided into two equal parts, she takes one part and the next-of-kin, or, if no next-of-kin, the Crown takes the other. If estate comprises freeholds, widow takes

the £500, charged rateably on the realty and the personalty (Intestates' Estates Act, 1890); this Act does not apply if intestate leaves *issue*, or if husband died partly testate, or if he died before Sept. 1, 1890.

If a person dies testate but without any next-of-kin the residuary estate, unless dealt with in the will, is to vest in the executor for his personal benefit, even against the Crown (*Roose* v. *Chalk*); since by 1 Will. IV., c. 40, executors were made trustees for the next-of-kin and responsible for the proper distribution to them of the undisposed of residuary estate according to the rules laid down in the St. of Distribution.

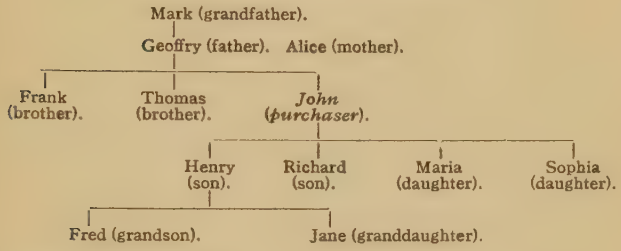
In the case of Freeholds on the death of **a cestui que trust intestate and without heirs**, by the Intestates' Estates Act, 1884, there is now an escheat to the Crown; before the passing of that Act the trustee would have taken the lands free from trust.

Descent of freeholds and (often) of copyholds depends originally on Norman custom of Primogeniture, Saxon custom of Gavelkind, and custom (probably older) of Borough English, these two latter customs being preserved by Inheritance Act, along with any special customs of descent in manors, when proved as a fact and not unreasonable. Freehold lands may devolve on the Crown or (if copyhold) the Lord of the Manor under the law of *Escheat*, which arises on the death of the

tenant intestate and without heirs; it very seldom occurs at the present day owing to the L. P. A. A., 1859 (see *ante*).

TABLE D.

ILLUSTRATING CANONS OF DESCENT.



Canon I. John,
,, II. John's children.
,, III. Henry.
,, IV. Fred.
,, V. Geoffry.
,, VI. Mark before Alice.
,, VII. Frank and his issue, then Thomas and his issue before Mark.

CHAPTER V.

COMMUNITY.

* *Refer to Table E on page 80.*

A SOLE tenant of freeholds is said to hold in **SEVERALTY.** Two or more tenants of same land at same time hold in **COMMUNITY,** which may be (I.) **Joint-tenancy,** (II.) **Tenancy in common,** (III.) **Coparcenary,** or (IV.) **Tenancy by entireties.** In (I.), (II.), (III), but not (IV.), they are said to hold in "*undivided* shares."

I. **JOINT-TENANCY** is common ownership by *grant* or *devise,* without *words of severance* or actual *subsequent severance, i.e.* without any words implying that the tenants are to take in shares divided or undivided, *e.g.* devise of lands in fee simple to A. and his son B. and their heirs or assigns. It has, or may have, four "Unities" of (i) **Interest,** (ii) **Title,** (iii) **Time,** and (iv) **Possession.** (i) denotes equality of *quantity, i.e.* A. and B. may each have estate for life *or* in fee, but not one for life, the other in fee. (ii) shows that they take by *same* instrument. (iii) that the estate of each vests at the *same* moment, but this is necessary only at C. L.; if they take by

will, or *deed* operating under St. of Uses, the children of A. may, *e.g.* take as they are successively born. (iv) is also known as "seisin *per my et per tout*," *i.e. each has equal aliquot share of benefit in undivided whole, e.g.* A., B., C., must be interested to extent of undivided one-third each, neither more nor less.

But the chief incident is **Survivorship**; thus, if A., B., C., are joint-tenants, on the death of A. estate survives to B. and C. jointly, and on death of B. vests in C. in severalty, who may dispose of it as he likes. Such survivorship on death since 1897 is preserved by L. T. A. Thus *Jointure* takes its name from having been formerly provided by way of *joint* estate to a man and his intended wife, so that she might hold in severalty by survivorship. So, too, trustees are always made joint-tenants, for convenience of survival of trust estate; in some other cases it occurs by inadvertence. Law is said to "lean towards joint-tenancy," equity against it; accordingly, without any words of severance, (i) in *partnership lands*, though legal estate survives, it is held in *trust* for representatives of deceased partner; (ii) *purchasers* with *unequal* shares of money are presumed to buy the land as tenants in common, not joint-tenants; (iii) *mortgagees* do the same, whether money is advanced in *equal* or *unequal* shares.

Each joint-tenant may alienate his own share *inter vivos* (*not by will*); *e.g.* if A., B., C., are

joint-tenants, and C. sells to D., then A. and B. continue joint-tenants as between themselves, but collectively hold in tenancy in common with D. If, however, C. sold to B., the joint-tenancy would wholly cease, unity of possession being destroyed; A. and B. would now hold as tenants in common. Marriage does not operate as destruction of a joint tenancy, *e.g.* if lands are devised to A. and B. (two daughters), and B. marries, on the death of B., notwithstanding her marriage or her will, the property survives to A.

Joint-tenancy may, however, be severed: (*A*) by **partition** which is effected (i) by *agreement*, followed by *mutual releases* effected by deed; (ii) by *order* of Board of Agriculture; (iii) by *Partition action* under the Partition Act of 1868, under which the Court *shall* direct *sale* instead of partition, if tenants interested to extent of one-half *require*, unless Court sees good reason to the contrary, and may, if those interested to less extent *desire*, and can show good reason for the sale, unless other joint tenants agree to purchase share of any party desiring a sale; (*B*) by one or other joint-tenant **alienating** his share to a third person; (*C*) by one joint-tenant for life or in fee tail **acceding** to inheritance in fee, which may arise by death, purchase, or grant.

II. **TENANCY IN COMMON** is common ownership arising (1) by *grant* or *devise* **with** *words of severance*, *e.g.* grant of lands to A. and B. in distinct undivided moiety to each; (2) by

different titles; or (3) by *subsequent* derivation from joint-tenancy. The only unity is of *Possession*, and even as to this they need not hold the undivided land in equal shares. In copyholds, admission of one joint-tenant admits all; tenants in common are separately admitted.

Cross-remainders, which often occur in tenancies in common in tail, are best shown by example, *e.g.* "to A. and B. and the heirs of their respective bodies as tenants in common, and if A. shall die without issue, then as to his share to B. and the heirs of his body," and *vice versâ*. They may be implied in a will, but not in a deed.

Tenancy in common may be severed—(*A*) by **Partition,** either (i), (ii), or (iii) (see *ante*); (*B*) by **Accession,** *i.e.* the whole estate becoming vested in the sole ownership of one of the tenants.

Grant "to A. and B. and survivor and his heirs" makes A. and B. joint-tenants for *life* with remainder in fee to whichever survives (*Quarm* v. *Quarm*). Grant "to A. and B. and the heirs of their two bodies" without words of severance, if A. and B. are persons who cannot intermarry (as brother and sister, or two males or females), creates joint-tenancy for *life* of both with survivorship, and on death of survivor tenancy in common in tail. If they are persons who can intermarry, it is tail special: A. and B. enjoy it for their joint lives; on death of (say) A., B. enjoys it as survivor; on death of B. it descends to the heir in tail, if any; if not, the

estate determines. Joint-tenants convey their interest to one another by Deed of Release as they are seised *per my et per tout;* tenants in common convey to each other by deed of Grant as they hold *per my et non per tout.*

III. **COPARCENARY** is common *ownership by co-heirs* and arises solely by *operation of law.* It has the unities of **Interest, Title,** and **Possession,** but as to the last the seisin is *per my* only, and the tenants have not necessarily equal aliquot share. There is no Survivorship. Tenants in gavelkind are said to take as coparceners; otherwise at C. L. coparceners are **females** or **claim through females,** *e.g.* if A.'s fee simple descends to his two daughters, B. and C., they take as original coparceners; if C. marry, and die, leaving a son, D., and a daughter, E., B., and her nephew, D., are now coparceners. Old baronies are often in tail general, and through coparcenary become "dormant," since no heir is generally called up while another survives. Partition is as in tenancy in common, and could always be compelled at C. L. (a statute of Hen. VIII. extended the right to joint-tenants and tenants in common), hence the name; coparceners =co-partitioners. Coparcenary is severed by (*A*) *Partition*, either (i), (ii), or (iii) (see *ante*); (*B*) by *Accession, i.e.* the whole estate becoming vested in the sole partnership of one of the coparceners; (*C*) by one coparcener *alienating* her share to a third person. Voluntary partition is

generally by "grant to uses" * so constructed as to make each coparcener a *purchaser*.

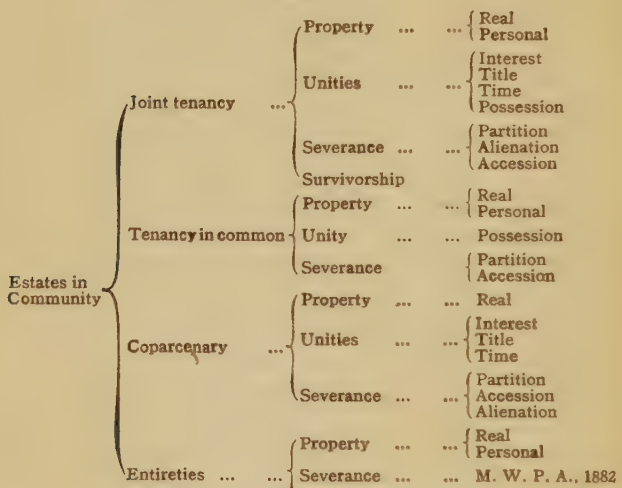
IV. **TENANCY BY ENTIRETIES** is common ownership by man and wife under grant or devise **after marriage,** causing seisin *per tout* only, with **survivorship.** It arises out of legal "unity" of **husband and wife.** Hence, at C. L., grant or devise "to A. and B. (wife of A.) and C.," whether in words importing joint-tenancy or tenancy in common, makes A. and B. tenants by entireties of **one half,** husband taking the rents and profits during the coverture, and C. joint-tenant or tenant in common with them as to the **other half.** Under devise *before* M. W. P. A., 1882, falling into possession *after* Act, or grant or devise *after* Act (*Re Jupp, re March*), the beneficial *enjoyment* of the tenancy by entireties is affected, B. having now half of the first half to her separate use. On a grant of lands to husband and wife jointly, made since M. W. P. A., 1882, it would appear that husband and wife take as joint tenants. Thus, since the passing of this Act, tenancy by entireties is tending to become obsolete.

Joint-tenancy, tenancy in common, and tenancy by entireties, may arise in respect of either *real or personal* property, arising *either by deed or will;* coparcenary is limited, however, to *real property* and may only arise *by descent*.

* *v.* p. 183.

Neither *dower nor curtesy* attaches to joint estates, but it may attach in respect of tenancy in common.

TABLE E.


Estates in Community
Joint tenancy
Property ... ... Real / Personal
Unities ... ... Interest / Title / Time / Possession
Severance ... ... Partition / Alienation / Accession
Survivorship
Tenancy in common
Property ... ... Real / Personal
Unity ... ... Possession
Severance Partition / Accession
Coparcenary
Property ... ... Real
Unities ... ... Interest / Title / Time
Severance ... ... Partition / Accession / Alienation
Entireties ... ...
Property ... ... Real / Personal
Severance ... ... M. W. P. A., 1882
Survivorship

CHAPTER VI.

EXPECTANCY.

* *Refer to Table F on page* 94.

Possession includes *right* as well as *fact.* A. has an "estate in possession" (1) if he is lawfully enjoying it either actually himself or by his tenant; but equally (2) if B. is wrongfully holding it against him, A. has *possession* consisting in a present "Right of Entry." If, however, B. is lawfully holding it, and A. is legally bound to wait for determination of B.'s estate, or some other event, then A.'s estate is "in *expectancy.*"

Estates in Expectancy are divided into (I.) **REVERSIONS**; (II.) **REMAINDERS** (1) **Vested,** or (2) **Contingent**; (III.) **EXECUTORY INTERESTS** (1) **by Will** (*Executory Devises*), and (2) under **St. of Uses,** including (i) *Springing Uses,* (ii) *Shifting Uses.* Contingent Remainders were formerly not recognised as "estates," and Executory Interests (or Limitations), as the name imports, are hardly yet so recognized. More strictly they are "possibilities coupled with an interest."

I. **ESTATE IN REVERSION** is that estate which *remains* in the original grantor by *operation of law* after grant of "*particular* estate," *i.e.* of something less than the grantor's whole estate; *e.g.* grant of (a) estate tail by tenant in fee simple, or of (b) term of years by tenant for life, leaves reversion in fee or for life respectively in grantor expectant on determination of particular estate or interest. The grantee is then said to hold of grantor by "*Imperfect* Tenure," as distinguished from, *e.g.* tenant in fee simple holding of Crown or of lord of ancient manor. If the particular estate is freehold, as in (a), the reversioner is said to be "seised of the *reversion*"; if an interest less than freehold, as in (b), he is said to be "seised of the *land*." Hence reversions and other estates in expectancy cannot be conveyed by "feoffment," which requires actual seisin of the land. The reversion was always alienable by deed, but at C. L. "attornment," or consent of tenant to accept new lord, was necessary, until abolished by Attornment Act, 1705.

Rent may always be *expressly* reserved on grant of estate for *life* or term of *years*—in the latter case generally is. On alienation of reversion, at C. L., rent passed to alienee, but not *benefit of condition* (*e.g.* proviso for re-entry on non-payment of rent or breach of covenants), which could only be reserved to grantor and his *heirs* (not "*assigns*"). The grantees of abbey

lands, at the dissolution of monasteries, being resisted by old tenants in their attempts to re-enter, got a statute passed (32 Hen. VIII.) giving alienee of reversion the benefit of covenants and conditions; under C. A., alienee of whole or *part* of reversion may re-enter under proviso in lease for life or years, on non-payment of rent or breach of covenants.

If fee simple is granted, there is, of course, no reversion left; but if grant is subject to condition of re-entry, there is said to be "*possibility* of reverter."

II. **ESTATE IN REMAINDER** is that estate which *is granted away* by the grantor at the same time and by the same instrument as the particular estate, and which is expectant on the determination of the particular estate, *e g.* if A. being owner in fee simple grants a life estate to B. with ulterior estate to C. and his heirs, C.'s estate is a **Remainder**; whereas if the grant had been simply to B. for life, then on the determination of B.'s estate the lands would "revert" to the original grantor A., A.'s estate is a **Reversion.** A **Remainder** arises by *act of party*, not by operation of Law; a Reversion by *operation of Law.* There is no tenure between owner of particular estate and remainderman. The instrument may leave reversion after the remainder or last of several remainders, or may carve out whole estate into remainders, *e.g.* "to A. for life (particular

estate), and after A.'s decease to B. for life, and after B.'s decease to C. for life." This leaves reversion in grantor, but the instrument may continue, "and after C.'s decease to D. and his heirs," which exhausts the whole estate. On death of A., B.'s becomes particular estate as regards C., and so on. The particular estate may be any interest between tenancy at will and fee, the former being too small, the latter leaving nothing to remain. In copyholds, admission of tenant for life admits remainderman, fine being apportioned between them.

1. **Vested Remainders** are limited "*unconditionally*" to a *living and certain person, persons, or class*, and therefore capable, *when created*, of taking effect on determination of particular estate. Hence grant or devise "to A., and after his decease to his son, B." (already born), gives B. a vested remainder, *whether or not* he outlives A.; this he can, and always could, alienate. Falling into possession of a vested remainder may be accelerated by **Merger**, *i.e.* meeting of two estates, a greater and a less, both legal or both equitable (i) in *same right*, (ii) without any *intervening estate*, (iii) in *same person*. Thus, if A. is tenant for life of Blackacre, and bought the reversion in fee, his life estate would merge in the fee; if, however, he took the reversion in fee *en autre droit*, *e.g.* as trustee or executor, no merger arises, as A. holds "not in the same right." By the operation of

De Donis no merger arises where tenant in tail acquires the reversion in fee.

2. **Contingent Remainders** are limited to *uncertain person* or an *uncertain event; e.g.* "to eldest son of A." (childless), or "to B. (already living) if he shall attain 21." At C. L. they could be *devised* (if the person to take was ascertained), but not alienated *inter vivos*. Equity, however, enforced *assignment for value*, compelling assignor, if remainder afterwards vested, to execute proper conveyance. By R. P. A. they are alienable by *deed*. Their creation is subject to three Rules:—

(*a*) Contingent remainder of "*freehold*" must rest on particular estate of *freehold*, *e.g.* grant to A. for 99 years, remainder to A.'s son (unborn) in fee. The remainder being a contingent one required a freehold estate to support it; as it has not, it is bad.

(*b*) It must vest (if at all) *during* particular estate, or *eo instanti* that it determines. Particular estates may determine prematurely by forfeiture, surrender, or merger. Hence it was formerly customary to appoint "trustees to preserve contingent remainders," *i.e.* persons in whom the particular estate should vest on determination of life estate during life of tenant for life, and remain vested in them for rest of his life. This is now needless, for by R. P. A. vesting of a contingent remainder is not prevented by *forfeiture*, *surrender*, or *merger* of

particular estate. Contingent remainders were liable to fail on *death* of tenant for life before the *person* was ascertained or *event* had occurred. By Contingent Remainders Act, 1877, this danger is *partially* removed, the Act providing that contingent remainders *created after* 1877 should be capable of taking effect as executory interests, provided they would have been valid if *originally created as such* (*v. infra*, III.).

(*c*) A contingent remainder cannot be limited to child of *unborn person after* life estate to *that person*. This is much older than the Rule against Perpetuities, but taken along with (*b*) is generally sufficient to prevent "remoteness" in remainders; *e.g.* grant "to A. (bachelor) for life, remainder to A.'s eldest son for life, remainder to eldest son of such son born during life of A.," though the second remainder satisfies Rule against Perpetuities, is void under Rule (*c*). It is, however, subject to the *Cy-près* doctrine, viz. that if second remainder be (i) an estate *tail*, and (ii) by *devise* (not deed), the Court will construe as nearly as is possible by Law to intention of testator, and give estate *tail* (instead of life estate) *to first unborn person*. Thus A.'s grandchild has *chance* of taking by descent or subsequent settlement, but is not allowed to take as devisee under the will in question. Rule (*c*) is a particular case of old rule against "double possibilities," *i.e.* second contingency depending on first; *e.g.* "To A. for life, remainder to any

husband she may marry, remainder to their eldest son." Here A. might marry a husband unborn at date of limitation (1st possibility), and a son might or might not be born (2nd possibility); hence the last remainder was held void (*Re Frost*). But probably the rule forbidding a double possibility (except in the form of a gift to unborn child of an unborn person) no longer exists and the limitation in *Re Frost* is void on the ground that a contingent remainder limited to take effect after a contingent remainder will be void unless it must necessarily vest within the period allowed by the rule against perpetuities. The rule forbidding gifts to unborn child of an unborn person (which does not extend to personalty or to executory interests, but which does apply to equitable contingent remainders—*Re Nash*, *Re Clarke's Settlement*) co-exists along with Rule against Perpetuities (*Whitby* v. *Mitchell*); the latter rule operates to avoid legal remainder only in the rare cases where "no *other sufficient protection* against remoteness is attainable" (*Re Ashforth*). Thus the ultimate remainder in the following is void as a Perpetuity: "to A., B., C., survivors, and survivor; remainder to all children of A., B., C., born in lifetime of, or within twenty-one years after death of, testator; remainder after death of all other such children to *last survivor in tail*."

The same person may have *two* estates in same land, one in *possession* and one in *remainder*.

Hence follows the famous Rule in *Shelley's Case*, A.D. 1581, viz. If the *same* instrument limits an estate of *freehold* to a person, followed *immediately* or *mediately* by an estate to his *heirs* in fee or tail, the words "the heirs" are words of **limitation,** and not of **purchase,** *i.e.* they merely "limit" or mark out the estate taken by that person, whether in possession or remainder, and *do not convey* any estate in remainder to his heirs. *E.g.* under grant or devise of Blackacre "to A. for *life*, and after his decease to the *heirs of* A.," by application of the Rule in *Shelley's Case*, A. takes a fee simple in possession; and under grant or devise "to A. for life and after his decease to the heirs of body of A.," A. takes a fee tail in possession. Here the estate to heirs follows *immediately*. Again, grant or devise of Blackacre "to A. for life, and after his decease to B. for life, and after B.'s decease to the heirs of A." Here the estates to A. and to A.'s heirs cannot coalesce into one because of intervening estate to B., *i.e.* the last estate follows *mediately* on the first and therefore A. has life estate *in possession*, and fee in *remainder* expectant on determination of B.'s life estate. A. can sell his remainder or devise it by will, and thereby defeat the expectation of his heirs. If B. should predecease A., from that moment A. has fee in *possession*. On this rule six remarks may be made:—1. Both estates must be *legal*, or both *equitable; e.g.* "to A. for life, and after his

decease to B. in *trust*, for the heirs of A." gives A. a life estate only: 2. If an instrument gives an *estate* to a person and also gives a *power* to appoint a further estate in the same freeholds, an *appointment* * made later under that power is considered to be the *same* instrument; *e.g.* "to A. for life, subject to power in B. to appoint by deed," B. in A.'s lifetime appoints to A.'s heirs, A. thereupon gets fee in possession: 3. The intervening estate may be a *contingent* remainder; *e.g.* "to A. for life, and after his decease to the eldest son of B. (childless) for life, and after B.'s son's decease to the heirs of A.," A. takes fee in possession, which is at first *vested* but *defeasible*, and thus on birth of a son of B. "opens" to let in the remainder to B.'s son, A. now having life estate in *possession* and fee only in *remainder*: 4. In a will *superadded words* may contradict the rule of construction; *e.g.* devise "to A. for life, and after his decease to his *issue*" (the word "issue" in a will being taken as equivalent to "heirs of body"), gives A. estate tail; but "to A. for life, and after his decease to his issue *and their heirs*," gives A. a *life* estate only, and makes his issue take by *purchase* (*Morgan* v. *Thomas*, *Lawrence* v. *Lawrence*). 5. If land is granted by deed "to A. for life and then to A.'s heir at law" (in the singular), A. has a life estate only with contingent remainder to person

* *v.* p. 101.

who shall be A.'s heir for life (*Re Davison's Settlement*); but a devise "to A. and his male heir for ever" confers on A. an estate in tail male (*Silcocks* v. *Silcocks*). 6. The rule does not apply to executory trusts, *e.g.* if X. grants land "unto and to the use of B. and his heirs upon trust to settle it on A.'s marriage on A. for life and then on A.'s heirs of body," the land should be settled on A. for life, remainder to A.'s eldest son in tail, &c.

Rules (a) and (b) for contingent remainders do not apply (i) in *copyholds*, or (ii) to *equitable* contingent remainders: in the former case the seisin is throughout in the lord, in the latter in the trustees, and no further particular estate is needed. Though a fee cannot be limited in remainder on a fee, two fees may be limited in remainder *alternatively* on the same particular estate; *e.g.* "to A. for life, and after his decease to the eldest son of B. and his heirs, or, if B. have no son, to the eldest son of C. and his heirs." This is termed "contingency with a *double aspect*."

III. **EXECUTORY INTERESTS** are estates in expectancy *expressly* limited not as remainders, *i.e.* not as dependent on a particular estate, but on an event or condition which may occur *before* or *after* determination of previous estate, and which, if occurring *before*, *abridges* or defeats such estate. Hence Executory interest of freehold can follow term of years, and fee can be

limited after fee. They are created (1) at C. L. only **by will** of freeholds or other property (*Executory Devises*), or (2) **under St. of Uses,** in freeholds only (*Springing and Shifting* Uses). An *Executory Devise* is a devise by which an estate *in futuro* is allowed to be created and limited beyond the limit of time allowed by the rules of C. L.: *e.g.* devise to A. for life to the use of B. on death of C.; on C.'s death even in A.'s life B. takes the estate, thus defeating A.'s life estate; B.'s interest is an *Executory Devise.*

A *Springing Use* is a future estate created by a use limited to come into existence at some future time without any estate being limited to precede it, *e.g.* land is granted to C. to the use of B. from the beginning of next year; until the end of the year the legal estate results to the grantor.

A *Shifting Use* is a use which on the happening of some event is to shift away to another person and thus defeat some prior estate: *e.g.* grant of lands to A. until the death of B. and then to the use of C. and his heirs, if he assumes a certain surname, in default then to the use of X. and his heirs—C. takes the first use, but he fails to adopt the surname; the use "shifts" to X. and his heirs. Future interests in freehold will be construed as *remainders* and not executory interests if *capable* of taking effect at C. L. as remainders, *i.e.* if they can possibly be construed as *waiting* for determination of a previous estate.

Thus a devise "on trust for A. for life and after his decease on trust for B., C., D., or such as survive A. and attain twenty-one," was construed, not as an executory interest to vest when it was seen how many out of B., C., D., attained twenty-one, but as *vested* interests in fee divestible as to those who should predecease A. or die before twenty-one (*Penny* v. *Commissioner for Railways*). The Rule against Perpetuities * was especially invented to prevent "remoteness" in executory interests; and though it does not generally apply to interests following on an *estate tail*, it is invariably employed to test validity of interests after fee, life estate, or term of years; of "equitable" remainders, *i.e.* with *legal* estate in trustees; of remainders created under St. of Uses; and in some few other cases of direct legal remainders.† *E.g.* a grant or devise "to A. for life, and after his decease to his first son who shall attain the age of twenty-four," is in form a contingent remainder, and *as such*, according to the more probable opinion, is perfectly valid in its *creation*, since it must vest (if at all) on A.'s death, and will fail if no son of his has then attained twenty-four. If, however, it was created since 1877, and A. dies before his eldest living son has attained twenty-four, in that case by Contingent Remainders Act, 1877, it is construed as though originally an execu-

* *v.* p. 54. † p. 87.

tory interest, and *as such* it is of course *ab initio* void for remoteness, A.'s being the "life in being."

An executory devise or shifting use may on occurrence of some event *defeat* the previous estate (see *ante*), while a contingent remainder never can. An event on which such interests are frequently limited to arise is death of previous tenant "without issue" or "failure of issue." Formerly these phrases were often construed as meaning "indefinite failure of issue," *i.e.* failure of issue at any future time, however remote. The W. A. abolished the doctrine of "indefinite" failure,* confining it to date of death of first devisee. And by C. A., 1882, sec. 10, where by any instrument since that Act an estate in *fee* or term of *years* is vested in a person, with executory limitation over on *default or failure of issue*, the executory limitation shall become void on any such issue attaining twenty-one. *E.g.* devise "to A. and his heirs, but if A. die without issue, then to B. and his heirs"; before 1837 this might mean that A.'s estate should descend as long as issue remained, thus forming estate tail by implication with executory devise over on determination of such estate tail; between 1837 and 1882 would mean that gift to B. remained in doubt till it was seen whether A. left issue him surviving; if testator died since

* *v.* p. 171.

1882, it means that after any child of A.'s has attained twenty-one, A. is absolute master of fee to keep or sell at his pleasure. Also, by S. L. A., tenant in fee with executory devise over is tenant for life for purposes of Act; hence A. can, even before issue attain twenty-one, sell the *land;* the executory devise will then, if A. die without issue, take effect on the sale *money* as being "*capital money*" notionally converted into land.

Executory interests may be devised, and by R. P. A. conveyed by deed. Not being strictly estates, they do not merge when held by holder of immediate estate in possession.

As to springing and shifting uses, their creation and distinction, so far as different from executory devises, will be considered in the next chapter.*

TABLE F.

- Estates
  - Possession
    - Actual enjoyment
    - By lawful tenant
    - By wrongful act of present holder
  - Expectancy
    - Reversion
    - Remainder ... ... Vested — Particular estate
    - Remainder ... ... Contingent — Vesting
    - Remainder ... ... Contingent — Limitation
    - Executory interests — Will ... Executory devises
    - Executory interests — St. of Uses — Springing Uses
    - Executory interests — St. of Uses — Shifting Uses

* *v.* p. 99.

CHAPTER VII.

STATUTE OF USES.

* *Refer to Table G on page* 110.

USES, or the *beneficial* interests in lands detached from and opposed to the **LEGAL OWNERSHIP** or seisin (the seisin being conveyed by feoffment, the use by deed or writing *inter vivos* or will), were recognized by the Court of Chancery, but not at C. L. Their real origin is unknown, but they were employed by ecclesiastical corporations to evade the first St. of Mortmain, 1279 (7 Edw. I.), which provided for a forfeiture to the King of all lands given to a religious corporation; by means of a use this statute was evaded, *i.e.* the lands were given "to A. *to the use* of the religious house." A. had the legal ownership, but the benefits and profits were payable to the corporation. Although this was abolished as regards religious corporations by the second St. of Mortmain, 1391 (15 Rich. II.), *uses* continued in operation. They were also employed (1) to *evade feudal burdens*, (2) to avoid pressure of *debts on land*, (3) to render land indirectly *devisable* prior to the Old

Wills Act, 1540. The **USE** involved three persons: the **feoffor** conveyed by feoffment to the **feoffee to uses** to hold to the use of the **cestui que use.** If no use was declared, and the feoffment was for valuable consideration, the feoffee was seised to *his own use;* if no use was declared, and no consideration, there was a "*resulting use*" to the feoffor. The system played a great part during the Wars of the Roses; attainted Lancastrian or Yorkist in turn was found to have put his lands in safety by enfeoffing his lands to some convenient feoffee guiltless of all suspicion of treason. The Court and great lords disliking object (1), and the mercantile classes as creditors object (2), and the fact that by such conveyances the law was rendered nugatory where these "Uses" were in operation, at length the **St. of Uses, 1535 (27 Hen. VIII.),** was passed to sweep away the "Use" and put an end to all divorce between seisin and beneficial interest. By section 1, Where any *person* was (*a*) *seised* of lands, &c., to *use*, confidence or *trust* of (*b*) any *other person* or (*c*) *body politic*, such person or body politic should be deemed (*d*) *seised* in (*e*) *such like estate* as was the use.

The words lettered above bring out five points in this famous St.: (i) it is confined to *freehold*, excluding copyhold, leasehold, and pure personalty; (ii) it applies only where one is seised to the use of *another;* (iii) the first must be an *individual*, but the second or *cestui que* use may

be a *corporation;* (iv) the St. "executes the use," *i.e.* turns it into a *legal estate;* (v) this legal estate may be anything *not exceeding* the original estate of the feoffee, who (where the St. applies) becomes a mere "conduit-pipe" to carry the legal estate from feoffor to *cestui que use.* To illustrate:—(i) Grant of Blackacre "to A. and his heirs *to use of B.* for twenty-one years" vests the legal term in B., but demise of "term of twenty-one years in Blackacre to A. to use of B. and his heirs" is not affected by the St.; (ii) "to A. and his heirs to use of A. and his heirs" (or "*unto and to the use of* A. and his heirs") is also outside the St.; (iii) "to A. and his heirs to use of —— *College*" is within the St., but "to —— College to use of A. and his heirs" is unaffected; (iv) "to A. and his heirs to use of B. and his heirs" by force of St. gives both *legal fee and beneficial interest* to B., and nothing at all to A.; (v) "to A. and his heirs to use of B." gives B. a legal estate for life, but "to A. to use of B. and his heirs" gives B. a descendible estate during the life only of A., *i.e.* an estate *pur autre vie.* Where the Statute does *not* operate, validity and effect of a deed depend simply on C. L. or on some other statute.

Many important results followed from the St. and the cases interpreting it, some quite unforeseen by its authors. Of these we may notice six.

I. It was held by the C. L. judges that the St.

did not contemplate or effect a **"USE UPON A USE"** (*Tyrrel's Case*), *e.g.* "to A. and his heirs to use of B. and his heirs to use of (or 'in trust for') C. and his heirs" vests legal estate in B., leaving C. unrecognized at C. L., but protected by Equity under the name of *c. q. t.* This alone was enough to defeat the main policy of the St., **restore uses under now more fashionable name of trusts, and establish whole modern system of "equitable estates."** For simplicity the usual form of creating a trust is to omit A. entirely and grant "unto and to the use of B. in trust for C.," where the use to B. prevents legal estate from passing to C.

II. Further, it was held that the St. applied only to **"PASSIVE USES,"** *i.e.* where feoffee had nothing to do but hold to the use of another, and not to "Active Uses," where he had positive duties to perform, *e.g.* to collect rents, sell, &c. Hence, if trustee is to "pay *or* permit" *c. q. t.* to receive rents, &c., this in a deed gives legal estate to trustee, in a will *primâ facie* to *c. q. t.* The St. treated the words "use" and "trust" as synonymous; in modern times we employ the term "uses" where we wish to vest the *legal estate* in a person, and "trust" where some one is to take a *beneficial interest without legal estate*. Trusts may arise (1) in property other than freehold, (2) in freeholds where there are Active uses, (3) also by means of a "use upon a use."

III. **FUTURE ESTATES OF FREEHOLD MAY BE CREATED INTER VIVOS**—a thing unknown to the C. L. by means of "uses." These are the executory interests already referred to as **Springing** and **Shifting** Uses. In practice they are extremely complex, but in theory simple and easily distinguishable. A **Springing** Use is one made to *spring* up on a future event under this St. *without defeating* any previous estate created by same instrument, *e.g.* if A. seised in fee grants "to B. and his heirs upon A.'s own marriage to hold to use of A. for life with remainder to A.'s first and other sons in tail male," life estate and remainders "spring" up by way of use on the future event of A.'s marriage; until A.'s marriage there is a resulting use to A. in fee simple.* A **Shifting Use** is one which on a future event *shifts* away from one person to another, *defeating* previous estate given to this person by same instrument, *e.g.* if A. seised in fee grants Blackacre by deed "to B. upon A.'s own death to hold to use of C. and his heirs, but if C. do not within two years assume the name and arms of A., then to use of D. and his heirs," the use "shifts" away in the case provided for from C. to D. **Executory Devises,** whether of the Springing or the Shifting kind, may be created either directly, or (if in freeholds) under this Statute.

* *v.* p. 210.

IV. **AT C. L. A MAN COULD NOT CONVEY TO HIMSELF EVEN JOINTLY WITH ANOTHER, NOR TO HIS WIFE**; but under this St. A. could grant "to B. to *use* of C." (wife of A.), or "to B. to *use* of D. and A.," vesting the legal estate in C., or in D. and A. jointly. But by C. A., s. 50, he can now do either directly, without intervention of a use. C. A., s. 62, enables freehold land to be conveyed to the use that a person may have an easement over it, *e.g.* A. conveys the fee simple in Greenacre to B. to the use that C. and his heirs shall have a right of way over the lands.

V. **"USES TO BAR DOWER"** rest on this St., and were formerly employed on purchase of land by a man married before Dower Act, 1833. To prevent dower attaching, the purchase deed contained (i) general "power of appointment" over fee by purchaser, (ii) in default of appointment grant to use of purchaser for *life*; (iii) on determination thereof by any means during his life (*i.e.* by surrender, merger, or forfeiture), *remainder* contingent on such determination to a *trustee and his heirs* during rest of purchaser's life on trust for purchaser for life, (iv) remainder to use of *purchaser and heirs*. Thus purchaser had life estate in possession and fee in remainder, and (iii), however unlikely its actual occurrence, sufficed to prevent (ii) and (iv) from coalescing into estate of *inheritance in possession*, to which alone dower could attach, while, if he wished to

sell the fee, he could always convey by means of (i). Though now obsolete, these Uses are still necessary to be understood, because they frequently occur in purchase deeds of not remote date.

The St. of Uses does not apply to copyholds, and in the manor of Hexham, and possible elsewhere, where freebench and "customary dower" still attach to all lands owned during coverture, there is no special custom of surrendering to such uses as the above. To bar freebench or "customary dower" in such a case, either the wife must be party to any deed of sale to *release* her dower, or the purchase must be taken to purchaser and another jointly, the other being declared trustee for purchaser—at imminent risk of this trustee dying and leaving purchaser entitled in severalty, and his land liable to dower.

VI. **POWERS** mostly depend on this statute. "Power" is bare *authority to alienate*, vested in one or more, who may or may not also have *estate* in the land. Power formerly sometimes given in a will (before Land Transfer Act, 1897) to executors to sell lands is a (*a*) **C. L. power.** Powers of tenant for life under S. L. A., of trustee in bankruptcy, and many others, are (*b*) **Statutory powers.** (*c*) **Equitable powers** generally merely enable some one to convey an equitable estate. The most important powers not given by will are "powers of appointment"

operating under this statute. They imply three persons:—*donor* of power, *donee* of power, and *appointee*. When in a settlement, they are generally "powers of revocation and new appointment," *i.e.* to revoke existing uses and to appoint to new uses, such as before S. L. A. were vested in trustees, or sometimes in tenant for life. Any power may or may not be "clothed" or "coupled" with a trust; if it is, and the donee has not exercised it, the Court will enforce it, for Equity will not allow a trust to fail for want of a trustee. Powers of appointment are generally made exercisable by deed, or will, or both, and any person excepting a lunatic or infant may be appointed a donee (an infant may exercise a power of appointment *collateral* over real estate (*Re D'Angibau*), and an infant soldier on active service can exercise a power of appointment by will—Wills (Soldiers and Sailors) Act, 1918; *Re Wernher*); no consent of husband or acknowledgment by deed is necessary for a married woman donee. Powers of appointment may be defeated either by (*a*) *defective execution* or (*b*) *non-execution*. In case of (*a*) *defective execution*, *e.g.* if power should have been executed by deed only and the donee executes it by will, and it is not coupled with a trust, the Court will relieve against this "*defective execution*" in aid of any of five classes of appointees, viz. wife, child, creditor, purchaser for value, or charity (*Tollet* v. *Tollet*);

secus, when exercised by deed instead of by will. In case of (*b*) *non-execution* of powers, the Court will not relieve, unless the execution was prevented by fraud or the power is coupled with a trust (*Harding* v. *Glyn*). The donor can attach any formalities as requisite and sufficient to exercise of power *inter vivos*, but if exercisable by deed or writing other than will, ordinary deed with two witnesses is, by L. P. A. A., sec. 12, sufficient; by W. A., sec. 10, appointment by will may and must be made with regular formalities of a will, in addition to others (if any) specified by donor as requisite to "writing," *e.g.* seal (*West* v. *Ray*).

Other divisions of Powers are:—A. into (1) **appendant** (or appurtenant), (2) **in gross**, (3) **collateral**; B. into (1) **general**, and (2) **special** (or particular or limited); C. into (1) **exclusive**, and (2) **non-exclusive.**

A. (1) Powers **appendant** arise in cases where donee of power has an interest in the estate subject of the power, so that *exercise of power affects such estate; e.g.* power of sale, leasing, mortgaging, vested in tenant for life. (2) Powers in **gross** are also coupled with estate of donee, but *do not affect it: e.g.* power of jointuring vested in tenant for life, widow's interest arising after his death. (3) Powers **collateral** (or "simply collateral") are vested in stranger without estate in the land: *e.g.* power

of sale by trustees in whom no legal estate is vested.

(1) and (2) could always be released, or, unless clothed with a trust (*Eyre* v. *Eyre*), contracted not to be exercised; powers collateral could not, but now by C. A. (sec. 52) can be: and by C. A., 1882, s. 6, any power vested in more than one donee may by deed be disclaimed by one, and afterwards exercised by the other or others in the absence of a contrary provision in the deed creating the power. The release of a power is not impeachable merely because the effect is to benefit the donee of the power (*Re Somes*).

B. (1) **General powers** enable the donee to appoint to *any* one, including himself. (2) **Special powers** enable him to appoint only to *particular* person, persons, or class. Under both, appointment must not offend against Perpetuities, but under (1) the period runs from exercise of appointment, under (2) from creation of power, which in the respective cases "tie up" the property. *E.g.* A. having *general* power of appointment by will may appoint to any child of his own, or of any one else if born in A.'s lifetime, to vest at any age; for the appointment by will dates from A.'s death, and the appointee is thus the life in being. If A. by his marriage settlement has *special* power of appointment among his children, he cannot defer the vesting later than twenty-one; for here A.'s is the life in being. Special powers are also liable to

(*a*) "*excessive*," (*b*) *fraudulent* appointments. (*a*) *Excessive* appointment is one which includes persons not included within the benefits of the power, *e.g.* a power to appoint to A.'s children does not include grandchildren or nephews. The excessive appointment is not void *in toto* if it is separable, *i.e.* if the donee appoint to one who is an object of the power and also independently to one who is not, the void part does not avoid the whole appointment (*Alexander* v. *Alexander*). (*b*) *Fraudulent* appointments are void *ab initio*, for the donee of a special power must appoint honestly, and to appoint to one in particular under bargain for his (the donee's) advantage is a "fraud on a power." Fraud must be strictly proved, and it is not fraud *per se* to appoint to donee's infant child merely because in case of such child's death in infancy donee must inherit (*Henty* v. *Wrey, Re Somes*).

Special power is also sometimes used as meaning power to do some particular act or class of acts, *e.g.* power of sale, which (even when given to trustees for sale) does not *per se* carry powers of leasing, management, &c. And power to trustees to sell and exchange lands does not give power to sell land without timber or minerals (*Buckley* v. *Howell*). But by T. A., provided there is no contrary intention in the trust-deed, they may obtain general sanction of Court enabling them so to sell at any future time: also tenant for life under S. L. A. can now sell land excepting the

minerals and sell ripe timber with leave of trustees or order of Court. A mortgagee, by C. A., 1911, can sell land excepting the mining rights or sell mines apart from the surface.

C. (1) **Exclusive** powers enable donee to appoint to one or more of a class while excluding other or others: (2) **non-exclusive** powers do not. Formerly, powers were non-exclusive unless expressed to be exclusive, and even appointment of nominal share (*e.g.* one shilling) to one vitiated the whole, because it was an "Illusory Appointment." But by Illusory Appointments Act, 1830, such appointments were allowed, and by Powers of Appointment Act, 1874, any object of power may be excluded in appointments subsequent to that Act, unless the power is expressly non-exclusive by specifying minimum share which every object must get.

Powers given to two or more jointly do not survive on death of one donee, unless (i) when so created, (ii) by C. A., sec. 3, when given to executors or trustees with no contrary intention expressed.

Powers of attorney, *i.e.* authority to one to do legal acts for another, are in general effectual only during life of donor, and, if not given for value, are revocable at any time, and suspended by his insanity. By C. A., sec. 47, however, donee is not liable for any payment or act made without notice of death, lunacy, or revocation; and by sec. 46 the donee may, instead of execut-

ing the powers in the donor's name, execute in his own name; and by C. A., 1882, secs. 8, 9, under powers created after the Act, a purchaser also is protected in absence of notice, if (i) the power is given for *value* and expressed as *irrevocable*, or (ii) whether for value or not, is expressed as *irrevocable* for a *year or less*. When exercising the power of appointment, the donee may reserve a power of revocation without being expressly authorized so to do; but a power to be exercised only with consent of a certain person is illegally exercised if this is not obtained (*Fitzroy* v. *Harris*).

Estates arising under St. of Uses may be *legal* or *equitable*. Thus, whether at C. L. or under the St., when fee is said to be "vested in A.," this may mean that A. is (i) an ordinary owner, having *legal* and *equitable* estates, or (ii) a trustee, having "dry" *legal* estate only in trust for owner of *equitable* estate, or (iii) a *c. q. t.*, having *equitable* and beneficial interest only, while legal estate is "outstanding" in another.

As to equitable estates, "Equity follows the Law," both as to quantity and quality of estate, words of limitation, devolution, &c. Curtesy attaches to equitable estate, and since the Dower Act, 1833, dower also; equitable estates may be taken for payment of judgment debts (Judgments Act, 1838); the rule in *Shelley's Case* also applies to equitable estates. A trust of lands, by St. of Frauds, requires declaration in writing,

unless it arises by legal construction; but once established, "Equity will not suffer a trust to fail for want of a trustee." On death of sole trustee, by C. A., s. 30, the legal estate vests in his personal representative (not in case of copyholds, which by Copyhold Act, 1894, still vest in heir or devisee), but trustees of land are generally kept up to the number of three, or two at least, by appointment of new trustees. These may be appointed (i) under any express power to that effect in the trust deed or will; (ii) under T. A., sec. 10, when any trustee dies, is out of U. K. for more than twelve months, desires discharge, &c., (a) by the person nominated (if any) for this purpose in trust instrument; if none, (b) by last continuing or surviving trustee; or, if none living, (c) by his personal representative; such appointment when made by deed by mere declaration vests in new trustee any trust-property other than copyholds, mortgage lands, or shares and stocks; (iii) if trustee is infant or lunatic, or no one has accepted the trust, or it is otherwise "difficult or impracticable" to appoint, then under T. A., sec. 26, the Court may appoint, and may also make a "Vesting Order," vesting the legal estate in such new trustee or trustees. If one trustee desires to retire from the trust he may do so (1) by deed, (2) his co-trustees, of whom there must be at least two, consenting (T. A., sec. 11). On appointment of Public Trustee as trustee of

any trust, a co-trustee may retire without consent and notwithstanding that there are not more than two trustees.

A man and a corporation could not at C. L. be trustees jointly, since the first holds "to him and his heirs," the second "to them and their successors," but by Bodies Corporate (Joint Tenancy) Act, 1899, they may now hold jointly.

Court may under the Judicial Trustees Act, 1896, appoint a "Judicial trustee" who is an officer of the Court under its control and supervision. Under Public Trustee Act, 1906, the office of Public Trustee was established. Public Trustee is a corporation sole. Public Trustee may be appointed to act as ordinary trustee or as judicial trustee or custodian trustee.

Formerly a trustee of land had one chance of benefit. If the last *c. q. t.* died intestate and without heirs, beneficial interest reverted to legal estate, and so belonged to trustee. But now, by Intestates' Estates Act, 1884, equitable estate is liable to escheat, and the Crown or other lord takes the land.

It should be carefully noted that the words "*unto and to the use of*" the purchaser in an ordinary purchase-deed in no way make the deed operate under the St. of Uses, the purchaser being obviously not seised to use of another. The words "and to the use of" are not essential where (as in a purchase-deed) there is *consideration;* but they are always inserted by custom and

ex abundanti cautelâ to prevent any suspicion of resulting use, or use for any third person. In a deed of gift, on the other hand, operating at C. L., the word "use" is essential; otherwise the gift would be immediately undone by the doctrine of Resulting Use, which would arise by reason of there being no consideration moving from the donee to the donor for his gift.

It is very doubtful whether St. of Uses now fulfils any useful office, and whether it might not advantageously be repealed, preserving, of course, all existing instruments that operate under it.

We have now surveyed Corporeal Hereditaments both as to *quantity*, noting the *estates* and their *devolution* when of inheritance, and as to *quality*, marking the various kinds of *community* and *expectancy*, and the connection of *equitable* with *legal* estates.

TABLE G.

- Uses ...
  - Use upon a use
  - Passive uses
  - Future estates of
  - Joint conveyances
  - Uses to bar dower
  - Powers ... ...
    - Appendant, Gross, Collateral
    - General, Special ... ...
      - Excessive
      - Fraudulent
    - Exclusive, Non-Exclusive

CHAPTER VIII.

INCORPOREAL HEREDITAMENTS.

* *Refer to Table H on page* 122.

INCORPOREAL HEREDITAMENTS are *rights* (as distinguished from estates) connected with corporeal things, but capable of *separate enjoyment*, and of transfer by deed of *grant* or devisable by *will*. The chief kinds are (I) **Seigniory,** (II) **Advowson,** (III) **Tithe,** (IV) **Profit à prendre,** (V) **Easement,** (VI) **Franchise,** (VII) **Rent.** (II) and (IV) may be *appendant, i.e.* arising out of an ancient manor, originating before *Quia Emptores*, A.D. 1290, and assumed to be as old as "period of legal memory," viz. accession of Richard I., 1189. (I) Seigniory is rather "*parcel of manor*" than truly appendant. (IV), (V), (VI), and (VII) may be *appurtenant, i.e.* attached to ownership of particular land by (i) *grant*, (ii) *prescription*, or in some cases by (iii) *custom*. All, except (V) and (VI), may be in gross, *i.e.* belonging to a person in his own right, not as annexed to ownership of land. The distinction between "appurtenant" and "in gross" resembles that between prædial and personal servitudes in Roman law, while the notion of "appendant" is purely feudal.

I. **Seigniory** means the rights of the lord of a manor over the lands forming part of that manor, and becomes chiefly noticeable when it is in gross, and as such can be bought and sold and carries right to quit-rents, fines, heriots, and sometimes advowson. As parcel of a manor, it is generally in fee, but may be in tail with reversion in the Crown.

II. **Advowson** is perpetual right of *presentation* to benefice or "incumbency" of parish, originally, for most part, appendant to manor. But lord of manor could grant it away to some private person or to an ecclesiastical or other corporation. Thus many advowsons are in gross. If grantee was a monastery, it usually kept the chief emoluments (glebe lands and "great tithes"), sending one of the monks or some other priest to fill the living as Vicar, and allowing him the "small tithes." At the dissolution of monasteries, the advowson with great tithes, etc., passed by Crown grant to some layman, called in respect of tithes an "impropriator," and in respect of advowson a "lay Rector" or patron. Where no such separation has occurred, the living itself remains a Rectory. In either case "Next Presentation," *i.e.* right to present when next the living is vacant, is not a hereditament, but devolves as personalty, while the advowson devolves as realty. By Benefices Act, 1898, an advowson cannot be sold by auction except as appendant to manor or estate, and separation and sale of next

presentation is forbidden. For recovery of advowsons the action of "quare impedit" must be commenced within three successive adverse incumbencies, or 60 years, but in no case to exceed 100 years (R. P. L. Act, 1833).

III. **Tithe** is right (originally) of parson (Rector or Vicar) *to take one-tenth of the produce of all lands in the parish in kind, i.e.* every tenth sheaf, pig, &c. It was often "commuted" to a fixed annual sum by a modus or arrangement between owner of tithable land and parson made binding on successors of latter. We have seen how tithe is now often payable to a "lay impropriator." By Tithe Act, 1836, payment in kind was changed to "*Tithe Rentcharge*," varying with price of corn. "Extraordinary Tithe" on hop-gardens and orchards in Kent, &c., is commuted by Extraordinary Tithe Redemption Act, 1886. Tithe is payable half-yearly, is under Act of 1836 apportionable, and is recoverable by distress after twenty-one days' arrears, and by execution after forty days. Payment and recovery are now regulated by Tithe Act, 1891. Being of spiritual origin, it does not merge at C. L., but under the Act, where tithe-owner is entitled to freehold estate in the tithe-land, tithe may be merged by deed certified by Board of Agriculture (formerly Tithe Commissioners).

IV. **Profit à prendre** or right of common is divided into common of (i) *Pasture*, (ii) *Piscary*, (iii) *Estovers*, and (iv) *Turbary*, which last may

include not only cutting turf, but getting stone, sand, &c., *on land of another*. Common of *pasture* is the most frequent and important, and admits of two less usual variations: Common of (*a*) *vicinage*, where lands of two adjacent parishes are subject to be depastured by beasts of parishioners of both; and Common of (*b*) *shack*, where whole arable field is subject, after harvest, to right of pasture vested in owners of several strips forming it. Common of pasture is rarely in gross. It is appendant, when by operation of law freeholders of manor have right to pasture commonable beasts on manorial wastes. Horses, oxen, and sheep alone are "commonable," as connected with arable land of freeholder, and may not be "without stint," *i.e.* their number is strictly limited. It is appurtenant, (*a*) when claimed by copyholders, (*b*) by freeholders of manor on other terms than above, (*c*) by freeholders not of a manor. Copyholders may claim by special custom, freeholders by grant or prescription; the special custom of copyholders is an exception to general rule against "prescribing for a profit *à prendre in solo alieno* on ground of custom." By St. of Merton, 1236, the lord might "approve," *i.e.* inclose portion of wastes, leaving sufficient for rights of tenants (now only by leave of Board of Agriculture under Board of Agriculture Act, 1889); much also was lost by encroachment of neighbouring freeholders, or of "squatters," holding without interference till

they gained a 20 years' title by occupancy. By Inclosure Act, 1845, and other Acts, public and private, inclosure is now made under sanction of Board of Agriculture under Board of Agriculture Act, 1889 (formerly Inclosure Commissioners), after local enquiry; and by Commons Preservation (or Regulation) Act, 1876, any person encroaching upon a common is guilty of a public nuisance and punishable by the justices; also the local authorities and private individuals may take action in the County Court and High Court to have encroachments removed.

V. **Easement** as distinguished from commons (which are described as profits *à prendre*) is a "*privilege or convenience without profit*," the owner of dominant tenement being merely empowered to compel owner of servient tenement to permit or refrain from some act on latter for benefit of former. Easement is Affirmative (or Positive) if, *e.g.* owner of X. must permit owner of Y. to use a right of way across X. It is Negative if, *e.g.* owner of Y. must refrain from blocking up "ancient lights" of X. Easements comprise Right of (1) *Way*, (2) *Watercourse*, (3) *Light*.

(1) Right of *Way* is the right which an individual or body of persons may have of passing over another man's lands, being therefore in the nature of a privilege or convenience and not a profit.

(2) Right of *Watercourse* is the right to the free and uninterrupted flow of water by a person having the legal uses and enjoyment thereof, and is not confined to his own property, but to riparian owners higher up and lower down the stream. By ancient custom or grant a riparian owner or his tenant may have the right to obstruct the stream for some special object, *e.g.* to run a water mill.

(3) Right of *Light* is the right to have free access of the sun's light to windows without obstruction by others. This right is also commonly known as "ancient lights," for unless it has originated in grant or by prescriptive title of twenty years, it may be defeated by blocking access of light.

Easements are "apparent" if discoverable on inspection by one ordinarily conversant with the subject, and "of necessity" if absolutely requisite to reasonable enjoyment of tenement, *e.g.* in the older text-books a way "to church and market" was said to be of necessity. "Quasi-easement" is ambiguous; it may mean either rights *de jure naturæ* as against another's interference with light, air, and running water; or may be the use made of one tenement by another, both belonging to same owner. If the ownership is severed, quasi-easements which are apparent, necessary, and continuous pass, unless contrary intention is expressed. Though easements in gross appear to be unknown, there may be a

licence unconnected with ownership of land, but this is a personal right and not a hereditament. There are also licences connected with grant of land, different from easements and profits *à prendre* by being not permanently annexed to the estate granted, of which any fixed annual payment for the privilege affords presumption; such licences may probably be made irrevocable for any period within limits of perpetuity. Easements arise by (i) **Custom,** *i.e.* local usage, (ii) **grant,** (iii) **prescription,** personal usage,* (iv) by "**necessity**" in case of rights of way only; and are extinguished by (*a*) **release,** (*b*) discontinuous easements also by **non-user for twenty years** (or less, if intention clear); and (*c*) **unity of possession,** which extinguishes all easements, except those apparent, necessary, and continuous, which are merely suspended, and revive on subsequent severance.

By C. A. (sec. 62) "any easement, right, liberty, or privilege" with respect to freeholds (*semble*, not profit *à prendre*) may be created by way of use, and even before the Act it could be conveyed along with dominant tenement by way of use.

Easements must be such as are known to the Law, not capricious; *e.g.* view over another's garden, but *semble* right to access of air for one's chimney or window may be gained by prescrip-

* As to how Title by Prescription arises, *v.* p. 159.

tion (*Chasty* v. *Ackland*); and right to increased lateral support for land weighted with buildings in an easement acquired by 20 years' prescription (*Angus* v. *Dalton*), but no such easement can be acquired in the case of support by subterranean water, so that there is nothing to prevent an adjoining owner draining away water which has the result of causing subsidence of his neighbour's property, providing this is undeniably traceable to the subterranean water. If the owner of a house and adjoining vacant land sells the *house*, an easement of light over the vacant land arises by implication, but if he sells the *land* no such easement arises unless he expressly reserves the right to light over the land sold (*Wheeldon* v. *Burrows*).

VI. **Franchise** is *royal privilege* in hands of subject arising by (i) Royal grant; (ii) prescription; (iii) Act of parliament; *e.g.* fair, ferry, free fishery (*i.e.* right of sole fishing in some part of public river, which must be anterior to Magna Charta, 1215; this statute expressly forbids any more of these grants). Franchises of treasure trove, of waifs and strays, of flotsam and jetsam, &c., are generally, when found, attached to a manor.

VII. **Rent** is a *fixed annual tribute* or *return* (reditus) *yielded* out of *corporeal hereditaments* either as part of *consideration* for estate or interest, or as *charge* thereon. The former is **Rent-service**, the latter **Rent-charge.** Rent lies in

rendre, not in *prendre* as commons, *i.e.* it must be yielded by the tenant, not simply passively enjoyed. **Rent-service** is an incident of *tenure*—of tenure proper, when payable out of land held on freehold or copyhold estate; of tenure improper, when out of lesser interest, as a term for years. Freehold and copyhold rents are alike called "quit rents"; the former are also known as "chief rents": both, if payable by tenant in fee, must be older than *Quia Emptores*, 1290, which abolished subinfeudation, and thus Rent-service can only arise as incidental to the reversion. Power of distress at C. L. was incident to all such rents in favour of grantor and his heirs; but if the rent was separated from seigniory or reversion (by separate grant of rent as in gross, or by reserving it on grant of the lands) the power of distress was lost, and the rent became "rent-seck" (*redditus siccus*), for which neither at C. L. nor statute was a power of distress given. Now, by Landlord and Tenant Act, 1730, power of distress is incident to all rents. Rent-service thus includes chief rents and other quit-rents, and also the better known case of rent payable by leaseholders of lands or houses to their landlord. The former is the older meaning; either may be payable in money, or in kind (out of *fructus industriales* only), or consist in services to be rendered. It is incident to reversion or the seigniory, and passes (by grant thereof, unless expressly reserved or otherwise severed) even

without express mention; it is apportionable at C. L. on severance of reversion.

Rent-charge is *not* incident of tenure, but arises by *express charge* on land. This may be by deed *inter vivos* or by will; in the former case generally under St. of Uses, 1535, by which interest in rent-charge for years, estate for life, or (very rarely) in tail, may arise. The charge may be granted for value, *e.g.* to secure repayment of a loan with interest, or as a gift, whether to relation or stranger. If not by will or marriage settlement, since judgments Act, 1855, it must be registered in C. O. (now in Land Registry under Land Charges Act, 1900) to prevail against subsequent purchasers or creditors without notice, but prevails against trustee in bankruptcy. "Fee-farm rent" is perpetual rent-charge amounting generally to a quarter of the yearly value, often where building land (especially in Northern towns) * is conveyed to purchaser and heirs to use that vendor and heirs receive the rent-charge, with further uses providing for distress and re-entry, and subject thereto to use of purchaser in fee simple. Rent-charge was not at C. L. apportionable, release of part of land operating as release of whole; this is amended by L. P. A. A., which decided that the release should affect only

* Ground rents in London are commonly incident to reversion on a term of 99 or 50 years. It has been proposed (in lieu of "Leasehold Enfranchisement") to turn them into fee-farm rent.

the part released and not the remaining part. A Rent-charge is distinguishable from an annuity, the former being charged upon real estate, the latter upon personal estate.

Both rent-service and rent-charge are extinguished by merger, if lesser estate or interest liable to rent and greater estate come into the same ownership. At C. L. rent-service incident on reversion was also extinguished by merger of that reversion in or surrender to a higher reversion; *e.g.* if A. seised in fee let for 50 years to B., and B. sublet for 21 years to C., and then B. acquired the fee, or surrendered for renewal, the reversion on the 21 years being merged in fee, B. lost right to receive rent from C. By R. P. A. rent and remedies are now not extinguished, being made incident to reversion in fee originally retained by A. and now belonging to B.

Distress was not at C. L. incident to rent-charge, and before the Landlord and Tenant Act, 1730, any rent-charge without express power of distress was "rent-seck." Now, by C. A. (secs. 44, 45), owner of rent-charge (if no contrary intention in title-deed) may (i) *distrain* after 21 days' arrear, (ii) *re-enter* after 40 days' arrear, or (iii) with or without taking possession, after 40 days' *demise to trustee* for a term on trust, by mortgage, sale, or sub-demise, to raise rent and arrears subject to all previous estates and interests. If this is found impracticable, sale or

mortgage of the land for the same purpose may be sanctioned by order of Ch. D. By C. A. 1911, it is declared that rule of perpetuities does not apply to any powers or remedies conferred by sec. 44 of C. A. 1881. Also, by C. A., sec. 45, both quit rents and perpetual rent-charges (other than fee-farm rent reserved on sale or lease for building) may be redeemed by payment to person absolutely entitled of the price certified by Board of Agriculture.

By L. P. A. A., where an estate or interest is liable to chief rent, rent on lease for years, or rent-charge, on decease of a tenant liable thereon, after existing liabilities have been satisfied, and the lease (if any) assigned to a purchaser, the personal representative is not liable for rent; but lessor or rent-charge holder may, in case of a personal covenant for payment of rent, follow assets into hands of beneficiaries.

TABLE H.

Incorporeal Hereditaments
- Seigniory
- Advowson
- Tithe
- Profit *à prendre* ... ... Pasture ... ... Vicinage, Shack
  - Piscary
  - Estovers
  - Turbary
- Easement ... ... Ways, Watercourses, Lights
- Franchise ... ... Fair, Ferry, Free fishery, Treasure trove, &c.
- Rent ... ... Rent-service, Rent-charge

CHAPTER IX.

CHATTELS REAL

* *Refer to Table I on page* 135.

CHATTEL INTERESTS IN LAND or **CHATTELS REAL** are not Real Property, nor (strictly speaking) Estates, nor do they properly involve Tenure. But the phrase "Estates for Years" has long been in use,* and "Leasehold Tenure," though strictly incorrect, is often spoken of. **CHATTELS REAL** include (1) **"Tenancy by Elegit,"** already noticed (see p. 57); (2) **Tenancy by "Statute Staple,"** and by **"Statute Merchant,"** which were two old forms of taking the debtor's lands as security, long utterly obsolete; (3) **Tenancy at Will** and (4) **Tenancy at Sufferance**; (5) **Leaseholds,** which have already been often referred to, and their devolution on intestacy set out in Chapter IV.

(3) **Tenancy at Will** is perhaps the origin of Terms for Years, which only by degrees became established. It may arise (*a*) by *grant* to that effect, followed by *entry;* (*b*) by *mere licence* and *entry*; (*c*) by *operation of Law*, *e.g.* under St. of

* Occurs incidentally in Co. Litt. 54 b; not once in 43 b.

Frauds, 1677, where any lease (other than for three years or less at a rack-rent) is made by parol. Doubtless, originally, it was solely at the will of the lessor, now the will of the lessee is equally implied. The tenant can alienate his interest as against himself, not as against the grantor. The lessor may determine the tenancy by notice, or by any act of ownership, *e.g.* entry; the lessee may determine by notice, surrender of possession, assignment with notice, committing waste; and death or outlawry of either has same effect. The tenant at will may obtain a claim to emblements if the tenancy is determined by the lessor.

(4) **Tenancy at Sufferance** arises when a person who came into possession by a lawful title holds on after such title has expired. It is therefore wrongful, but person entitled cannot treat tenant as trespasser, before entry. He can, after notice to quit, recover double value by action under Landlord and Tenant Act, 1730; under Distress Act, 1737, he can, after notice of quitting given by lessee, recover double rent by distress or action.*

(5) **Leaseholds** in point of Law are all of one kind, and being personalty, whatever the length, the tenant is "possessed," not "seised." In freeholds they arise by demise from the free-

* This is subject to the special restrictions imposed by the Increase of Rent and Mortgage Interest (War Restrictions) Acts of 1915-9.

holder, or as sub-term demised by lessee; generally in copyholds by demise from copyholder, but in some manors copyhold itself may consist of demise by lord for term of years.

Possession was for a time practically at will of lessor, who could "put Termer from his Terme" by a Common Recovery,* which lessee might not "falsify"—a practice checked by 21 Hen. VIII. The very name "term" shows there must be a definite date of ending, as opposed to indefinite end of freehold estate by death or failure of heirs. The beginning may, even at C. L., be future: *e.g.* "from next Lady Day." Tenancy is not complete till entry, before which tenant has only an *interesse termini*, which, however, is transferable *inter vivos* or by will but cannot be surrendered or released. An *interesse termini* is an immediate vested interest, not an estate in the land but a right to take possession when the stipulated time for commencement of the term arrives, and therefore does not offend the rule against perpetuities, even if it is not to commence until many years after the date of creation (*Mann, &c., Lim.* v. *Registrar of Land Registry*). Entry is not necessary, however, on demise under St. of Uses; *e.g.* if A. bargain and sell fee to B. to use of C. for 21 years, the term vests immediately in C. The usual form of creation is

* Thus evading the 13th century writ *Quære ejecit intra terminum*, which had attempted to secure lessee's interest, as bailee, during period prescribed by the bailment.

from (such a date) for (so many years), the years being any fixed number from one upwards. Numbers of frequent occurrence or legal importance are 1, 3, 21, 60, 99, 200, 300, 500, 999, 1000.

Leaseholds may be considered in the following divisions: (*a*) *Tenancy from year to year*, (*b*) *Lease for years*, (*c*) *Long Terms*.*

(*a*) *Tenancy from year to year* arises (i) by operation of Law, on demise at annual rent without express term; or on tenant overstaying express term and lessor accepting rent (*Doe* v. *Bell*); or (ii) by act of parties under verbal or written lease. It is determined by half a year's notice, which may be a "customary half-year," *i.e.* from one quarter-day to the next quarter-day but one, *but always so as to end with the current year*

* By the Increase of Rent and Mortgage Interest (War Restrictions) Acts of 1915-19 the power of a landlord to give the tenant notice to quit or to increase the rent is restricted in case of dwelling-houses in London when the rent is not over £70, and elsewhere in England when the rent is not over £52. These Acts are to remain in force until Lady Day, 1921; but between six months after termination of the present war and Lady Day, 1921, the rent may be increased 10 per cent. if the house is in good repair. If a person has bought a dwelling-house of the kind included in the Acts since September 30, 1917, and requires the house for his own occupation, or that of some person in his employ or in employ of some tenant from him, the Court can make an order for the recovery of possession of the house, if the Court after considering all the circumstances of the case thinks it reasonable to do so. These Acts do not apply to houses erected after, or in course of erection at, April 2, 1919.

of the tenancy: e.g. if the tenancy began at Michaelmas, the notice must be from Lady Day to Michaelmas; it cannot be from Christmas to Midsummer. In agricultural or pastoral lands and market-gardens there must be, under Agricultural Holdings Act, 1908, a year's notice, unless by agreement. Hence, a lease "for one year certain and so on from year to year" cannot be determined before two years from its beginning. A tenant of a house from year to year is in the absence of agreement liable only to keep it wind and water tight (*Re Cartwright*).

(*b*) *Lease for years* arises mostly by express demise, which, if for *more than three years*, or if three years or less and *not at rack-rent*, must under St. of Frauds, 1677, sec. 4, be in writing, and under R. P. A. by deed. But, if by express agreement for lease such as is specifically enforcible in Equity, or by lease void as not under seal, after entry it seems that for most purposes lessee's position is the same as under lease by deed, since J. A. (*Walsh* v. *Lonsdale*).

Lease for years determines (i) by efflux of period, (ii) sooner on fulfilment of condition (if any), *e.g.* lease "to A. for 99 years, if he shall so long live"; "to B. for 21 years, provided he shall not at end of 7 or 14 years determine it by written notice"; "to C. for 21 years, provided that on non-payment of rent, or breach of covenant, the lessor may re-enter and determine it," &c. It may also determine by

merger, and by surrender in fact, which by R. P. A. must be by deed, or surrender in law, *e.g.* accepting a new lease on different terms before old one expires.

The position of tenant for years as to *estovers*, *waste*, and *emblements*, is the same as that of tenant for life, except that, if he holds at a rack-rent, by Landlord and Tenant Act, 1851, instead of taking emblements, he holds on till end of current year of tenancy.

On ordinary terms rent is reserved. If lease is verbal or merely in writing (as for short term), or there is merely agreement for lease, the claim will be for "use and occupation rent." In lease by deed the following are the usual covenants reserved (*a*) for payments of rents, (*b*) general covenants (*e.g.* as to cultivating land, repairing buildings, use of house, fire insurance), &c.

(*a*) The obligation of complying with the covenant for payment of rent under his personal covenant thus binds **lessee** throughout the term, and, if he assigns the term to a purchaser, binds **assignee** also unless and until he re-assigns to some other.

(*b*) Other covenants bind **lessee** throughout *the term*, and **assignee** for the time being, provided they are such as "*run with the land*," *i.e.* (i) relate to things *in esse*, parcel of land demised, and which bind and make liable thereto any person having the possession of the lands; or (ii) where "assigns" are expressly named, relate to

things not yet *in esse,* but on land demised (*Spencer's Case*); (iii) restrictive (as opposed to affirmative) covenants by the lessor in equity bind also the lessee if he has notice (*Haywood* v. *Brunswick Building Society, Austerberry* v. *Corporation of Oldham*); and restrictive covenants entered into by lessee bind the assignee and even a sublessee, as latter are held to have constructive notice; *e.g.* (i) covenant by A. to repair existing houses on land, (ii) by A. for himself *and his assigns* to keep in repair houses hereafter to be built thereon; (iii) covenant by A. that no house of less rental than £30 shall be built on the land leased, binds the assignee, B., and (iii) binds also a sublessee (*Patman* v. *Harland*): but (iv) covenant by A. to build or repair a house on "other" land, being merely collateral, or *in gross,* and not touching any part of land demised, whether or not *in esse,* is strictly personal, does not run with land, and does not bind assigns (*Spencer's Case*).

By C. A., secs. 58 and 59, a covenant binds heirs and devisees, without express mention, as at C. L. it already bound executors and administrators. Also, by C. A., sec. 59, if lessor's estate is of inheritance, benefit of covenants belongs, without express mention, to heirs and assigns; if not of inheritance, to executors, administrators, and assigns; also rent and benefit of lessee's covenants go with reversion even though severed; and may be enforced by beneficial owner

(C. A., secs. 10-12), and obligation of lessor's covenants goes with reversion for benefit of owner of term for time being; and (unless contrary intention) covenant with two or more jointly may be enforced by survivor (C. A., sec. 60). The short effect is that when a lease contains covenants by lessor, or lessee, or both, after all sales of land, or assignments of lease during term, both benefit and obligation of covenants continue; that, if landlord's estate is equitable, he (and not merely the trustee) can sue for rent or on covenants; and that assigns need not be named in lessee's covenants, except to meet second part of rule in *Spencer's Case*.

A condition or proviso of re-entry was at C. L. "indivisible," *i.e.* if lessor once licensed breach of a covenant, or afterwards waived his right of re-entry, the proviso was extinguished (*Dumpor's Case*), nor could grantee of part of reversion use such proviso. Now by L. P. A. A. and C. A. (sec. 12) (1) licence or waiver of particular breach does not extend beyond particular instance; and (2) on severance of reversion, condition is apportioned, and may be used by assignee of each part of reversion.

At C. L. lessor could not recover rent by distress or action unless he had demanded it before sunset of last day for payment. By C. L. P. A. he may recover possession by action, without formal demand, if half-year's rent is unpaid, and no sufficient distress found on premises. Six

years' arrears are recoverable, but 20 years', if there is a covenant (Real Property Limitation Act, 1833; Civil Procedure Act, 1833); the action must be brought during relationship of landlord and tenant or 12 years afterwards (Real Property Limitation Act, 1874). Right of re-entry for non-payment of rent requires express reservation in lease.

As to **distress,** this must be levied on the premises leased, but landlord may follow goods fraudulently and clandestinely removed within 30 days (Distress for Rent Act, 1737); it must be levied during the continuance of the tenancy, unless the tenant is still in occupation when six months is allowed to distrain. By Landlord and Tenant Act, 1709, six years' arrears are distrainable except (*a*) in agricultural leases one year is the limit (A. H. Act, 1908), (*b*) if tenant is bankrupt, six months' (Bankruptcy Act, 1914).

Lessee is relieved from forfeiture on payment of arrears and costs before trial, or within six months after execution on judgment. At C. L. rent is payable yearly, but in leases it is commonly expressed to be quarterly, and recoverable as to quarter's rent without formal demand.

As to covenants in lease or agreement other than for rent, by C. A., sec. 14, lessor cannot enforce re-entry or forfeiture for breach till after giving a notice in writing and allowing reasonable time for remedy or compensation (this section applies also to under leases); lessee, either

in lessor's action or otherwise, may apply to Court for relief against forfeiture, to be given on fitting terms. Lessee cannot contract himself out of this right, but it does not extend to breach of covenants (1) against assignment, or (2) underletting, or (3) proviso of forfeiture on bankruptcy or execution if lessee's interest is not sold within a year, or (4) (in mining lease) for inspection by lessor of mine and books, (5) or to non-payment of rent; nor is relief in any case granted as to agricultural or mining lease, public-house, dwelling let with furniture, or other like cases where personal qualification of tenant is important (C. A., 1892, sec. 2). But **underlessee** may have relief against forfeiture on non-payment of rent by head lessee (*Gray* v. *Bonsall*).*

In absence of covenant, lessee may assign or sub-let. Between lessor and assignee there is, of course, privity, but not between lessor and sub-

* By the Courts Emergency Powers Acts, 1914-17, in case of leases granted before the outbreak of the war, and in certain other special cases, *e.g.*, when the rent does not exceed £50 a year or the tenant is an officer or man of His Majesty's forces, the landlord cannot levy any distress, or exercise any right of re-entry, for the purpose of enforcing the payment of any money or in default of payment of any money, except by leave of the Court, which leave may be refused if tenant's inability to pay rent or perform covenants is due to circumstances connected with the war, or, in case of officer or man of His Majesty's Forces, to other causes. These Acts are to remain in force until the termination of the war and for six months thereafter.

lessee; but sub-demise of whole residue of term is equivalent to assignment. On bankruptcy of lessee and "disclaimer" by trustee, sub-lessee becomes directly liable to lessor (Bankruptcy Act, 1914, sec. 54), but Court may protect him from forfeiture, and by Order vest the head-term in him, if desired (C. A. 1892, sec. 4).

A lease for years may arise by *estoppel*. If A., having no estate in the land or power of leasing, grant lease to B., both A. and B. are "estopped" from denying their own act, and if A. during the term acquire the land, the lease becomes fully operative. But if A. had some estate in the land, *e.g.* if, as tenant for life, he could lease under S. L. A. for 21 years, and he has in fact leased for 40, the lease is valid only so far as the lessor's power of leasing extends.

(*c*) *Long terms* are principally of three kinds:—(1) Terms of 100—1000 years, formerly created by way of mortgage as security for an advance, intended to be surrendered back on repayment. If mortgagee has taken possession, and statutory period of limitation has passed, he holds the land beneficially for residue of term. (2) Some Long Terms were created (chiefly in or about the reign of Elizabeth) as a device for making a personal interest in land which should be practically almost as valuable as fee simple. (3) Far more frequent and important are Terms in settlements limited to trustees as security for raising jointure, portions of younger children, annuities,

payment of debts, &c. No rent is reserved on (1) or (3); on (2) a nominal or "peppercorn" rent, if any. Further, in (3) there are usually no covenants or impeachment of waste. The beneficial owner of land in possession (tenant for life, or in tail) holds subject to such terms, but they can only be used for some particular purpose, and even for that only if it is not accomplished by some other means, *e.g.* out of savings, sale of portion of land under S. L. A., &c. The settlement may contain a "proviso for cesser" of term, when its purpose is fulfilled, and being no longer required as security it becomes a "satisfied term." Formerly, instead of this ceasing, it could be "kept on foot to attend the inheritance" by assignment to a trustee for any purchaser of the estate, in order to protect him against any secret subsequent incumbrance, or even a claim of dower of which he had notice. Now, by Satisfied Terms Act, 1845, every such satisfied term *ipso facto* ceases.

By C. A., sec. 65, and C. A., 1882, sec 11, any term or sub-term of not less than 300 years, of which not less than 200 is still to run, with (a) no rent or a peppercorn rent (*Re Smith & Stott*), and (b) without trust or right of redemption for freeholder, may by deed be "enlarged" into freehold by legal owner (whether also beneficial owner, or trustee) or personal representative of deceased owner. The reversion (which can be of only trifling value) is destroyed. Provision (b)

excludes (3) long terms in settlements, but (1) and (2) can generally be thus enlarged.

"Trust-term" is a common phrase applying to any term of years where the legal interest is in a trustee. A married woman's term of years will now generally be her separate property giving full power of disposal to her. In the rare cases where it is not so, the husband can *inter vivos*, but not by will, dispose of it, during coverture or after her death, and this whether it is legal or equitable, in possession or reversionary. By L. P. A. A. a man may by deed assign Chattels real to himself and another jointly.

A term of years is the only form of personalty capable at C. L. of Executory Bequest, *i.e.* A. may bequeath a term to B. for life, and after B.'s decease to C. The whole term then vests in B., but at his death "shifts away" to C., vesting in him and in his executor or administrator after his death.

TABLE I.

- Chattels Real
  - Tenancy by elegit
  - Tenancy by statute staple, and merchant
  - Tenancy at will ... ...
    - Grant and entry
    - Licence and entry
    - Operation of law
  - Tenancy at sufferance
  - Leaseholds ... ...
    - Tenancy from year to yea
    - Lease for years
    - Long terms

CHAPTER X.

MORTGAGE.

* *Refer to Table J on page* 152.

MORTGAGE of lands is the vesting of the estate or interest therein in the lender (mortgagee), as *security* for repayment by borrower (mortgagor)—a right *in rem*, subsidiary to a right *in personam*. It is (1) **LEGAL MORTGAGE**, if it vests in legal estate or interest; or (2) **EQUITABLE MORTGAGE**, which may mean (i) mortgage of "**equity of redemption**" after legal estate has already been parted with; or more generally, (ii) mortgage by **deposit of title-deeds** with or without writing. (3) **STATUTORY MORTGAGE**, which briefly differs only from an ordinary legal mortgage in that it is in the form provided and authorized by some Statute, *e.g.* Conveyancing Act, 1881, sec. 26, *et seq.* Statutory mortgages are most frequently used by local authorities when borrowing money on the security of their rates, see the Public Health Act, 1875, sec. 233,

et seq., Schedule (iv); Municipal Corporations Act, 1882, secs. 106, 120, Schedule (viii) Forms, pp. 2, 3; Local Government Acts, 1888, sec. 69; Local Government Act, 1894, sec. 12; and also in many Local Acts provision is made for borrowing money by means of a statutory form of mortgage, &c., inserted in the Act.

A mortgage differs from a *pledge* in that in this latter case the chattel is the sole security for the advance, whereas in a mortgage the mortgagor is liable in case the mortgage property, if sold, fails to realize the amount advanced by the mortgagee to be sued for the balance under the personal covenant by the mortgagor inserted in the mortgage deed.

A mortgage also differs from a *lien*, which is simply a right of retention of another's lands or goods until satisfaction by the owner of some demand in respect of them and there is no power of sale except after a reasonable time and notice given.

A mortgage also differs in many ways from a *Bill of Sale* as governed by Bills of Sale Act, 1882, principally because it need not be in any particular form and no registration is required.

(1) **LEGAL MORTGAGE** is by far the more important, resembling the *mancipatio contracta fiducia* of early barbaric Roman Law. In early times it was by feoffment to the creditor to

hold the land without account of profits till the debtor paid a lump sum, generally representing principal and interest. Hence its name of *mortuum vadium* (dead pledge), because the estate meanwhile was "dead" to the mortgagor. A "Welsh Mortgage" (now rare, if not obsolete) differed in that the mortgagee took rents and profits solely for interest. Legal mortgage now operates as a conveyance of estate or interest subject to *condition* or "*proviso for redemption*" till day named for repayment, afterwards at C. L. absolute, but in Equity only as security for loan and subject to "*equity of redemption*" till foreclosure or statutory lapse of time. This "*equity of redemption*," which is an estate alienable and devolving as realty, **is in mortgagor,** while *legal estate* **is in mortgagee,** but (unlike "dry" legal estate of trustee) carries rights and powers for his own benefit. The beneficial interest is thus divided between the two.

1. This peculiar state of things is the result of long conflict between Law and Equity. From time of James I. the Equity maxim has prevailed, "Once a mortgage, always a mortgage," *i.e.* the mortgagor's right to redeem the mortgaged property or his **"equity of redemption"** as it is termed is a necessary incident to every mortgage, and this right cannot be clogged or fettered (*Salt* v. *Marquis of Northampton*). In the case of *Noakes* v. *Rice* it was decided that a provision in a mortgage of a public-house for the

house to remain a "tied" one, even after redemption, was a "clog" and illegal; but in *Biggs* v. *Hoddinott* it was held that there was no objection to a provision that a mortgagor shall during the continuance of the mortgage buy from the mortgagee only all beer to be consumed on the mortgaged premises, nor to a provision that the mortgagor shall not be at liberty to pay off the mortgage before the expiration of a reasonable period, the mortgagee undertaking not to call in his money during the same period if interest be punctually paid meanwhile. Meanwhile, at C. L., the mortgagee having the legal estate was treated as owner, while Equity viewed the mortgagor as still virtually owner, subject to the rights of the mortgagee as creditor. Hence, a lease by *mortgagor alone* was void in Law, a lease by *mortgagee alone* bad in Equity. The present rights and powers of both may thus be summarized as follows:—

2. **Rights of mortgagor:** (i) to continue in possession (subject to any special provisions in mortgage deed) unless mortgagee gives notice of his intention to take possession; (ii) take rents and profits without account; (iii) cut timber and commit all waste, unless it renders the security insufficient; (iv) sue in his own name for rents and profits, against trespassers, &c. (J. A., sec. 25); (v) lease for 21 years, or 99 on building lease (C. A., sec. 18) while in possession and so long as a receiver of the income has not been

appointed by the mortgagee or when receiver so appointed is no longer acting (C. A., 1911, sec. 3); and can accept surrender of a lease for purpose of enabling a new lease authorised by section 18 of C. A., 1881, to be granted (C. A., 1911, sec. 3); (vi) redeem, giving six months' notice (if required) of repayment after the fixed day has passed (up to and including the day named in the mortgage deed for payment off of the mortgage debt, the mortgagor has the right to redeem without the necessity of giving six months' notice or paying six months' interest in lieu thereof); (vii) sue for redemption (or under C. A. in the alternative for order of sale); (viii) require inspection of title-deeds in mortgagee's hands (C. A., sec. 16); (ix) require mortgagee to transfer instead of re-conveying providing the mortgagee is not or has not been in possession (C. A., sec. 15).

3. **Rights of mortgagee:** (i) to take possession (subject to any provisions), but on terms of strict account; (ii) insure after the date of the mortgage deed (C. A., sec. 19); (iii) appoint receiver which arises when the mortgage money becomes due, but is not to be exercised until the statutory power of sale has arisen (C. A., secs. 19-24); and (iv) sell, in both cases, on two months' default of interest, or three months' default after notice requiring payment of principal, or on breach of some other provision, *e.g.* insurance of mortgaged premises (C. A., secs. 19-24). By C. A., 1911,

sec. 4, if mortgage executed after year 1911, mortgagee can sell subject to restrictive covenants affecting land sold or retained and can sell surface of land excepting the mines or sell mines apart from the surface. By C. A., 1911, sec. 5, upon any sale made by a mortgagee in professed exercise of his statutory powers, a purchaser is not and never has been concerned to enquire whether a case has arisen to authorize the sale or due notice has been given or the power is otherwise properly exercised; (v) in any action for redemption, foreclosure, &c., apply to Court for order of sale (C. A.); also, if in possession, (vi) lease for 21-99 years (as above); (vii) cut ripe timber, not being ornamental, when in possession (C. A., sec. 19); and (viii) by C. A., 1911, sec. 3, a mortgagee who has appointed a receiver can grant leases as above, and a mortgagee in possession, or who has appointed a receiver, can accept surrenders of leases for purpose only of enabling a new lease authorized by sec. 18 of C. A., 1881, to be granted.

Thus mortgagor is in the everyday acceptation of the term the beneficial owner, unless mortgagee takes possession, from which (except in extreme necessity) he is deterred by the strict account he has to give of his possession, being liable to mortgagor for all profits beyond reduction of principal, interest, and actual expenses; he is even liable for occupation rent, if he occupies, instead of letting the land. If, on

the other hand, he appoints a receiver, the receiver is deemed agent of mortgagor, unless otherwise provided; may claim commission; and after payment of interest and any prior claims, must pay the rest of the annual profits to the mortgagor or other person entitled to income (C. A., secs. 19-24). The mortgagee may not even try to enforce punctual payment of interest by inserting a proviso in mortgage-deed for higher rate of interest if paid in arrear, this being deemed void as a "penalty"; but the same result may be secured by providing for the payment of a lower rate of interest if the same is paid punctually, *e.g.* for 5 per cent. interest reducible to $4\frac{1}{2}$ per cent., if paid before or on a certain day. A provision for the payment of a commission by the mortgagor in case interest is overdue or for compounding interest are both valid.

An attornment clause, by which mortgagor "attorned" as tenant to mortgagee at rent equal to interest was sometimes inserted to enable mortgagee to distrain (*Re Roundwood Colliery Co.*); but as this requires registration as a Bill of Sale, in accordance with the provisions of the Bills of Sales Acts, 1878, 1882 (*Ex parte Kennedy*) and as every bill of sale for securing the payment of money must be in a specified form to which a mortgage of land cannot conform, it is abandoned as means of distraining, but as constituting relation of landlord and tenant may

be used to enable mortgagee to sue for possession under O. XIV (*Kemp* v. *Lester*).

4. **The remedies of a legal mortgagee** are (*a*) to appoint a receiver; (C. A., secs. 19-24) (*b*) to take possession; (*c*) to sell under his statutory power where the mortgage money has become due (C. A., secs. 19-24), or any special power in the deed; (*d*) to sue on personal covenant generally inserted in the deed, or on collateral bond (if any); (*e*) to sue for foreclosure or sale in the alternative.

5. As equity of redemption is incident to position of mortgagor, so is right of **foreclosure** to that of mortgagee. At any time after date in deed named for repayment (usually six months from execution), if any money remains unpaid and in arrears for principal or interest, mortgagee may bring foreclosure action. Judgment is for account to be taken before Master in Chambers of amount due for principal, interest, and costs, with six months from date of Master's certificate for payment, or further time by leave; in default of payment, order for foreclosure is made absolute. This *ipso facto* extinguishes equity of redemption, and makes *mortgagee absolute beneficial as well as legal owner.* It binds all parties to action; therefore all subsequent mortgagees (who have a right to redeem) should be made parties to such action.

A mortgagee may pursue all his remedies concurrently. But if he sue on the covenant after foreclosure, he re-opens the foreclosure; hence he cannot thus sue, if he has first foreclosed and then sold the land. Nor after Foreclosure Order *nisi* can he sell under power of sale without leave of Court.

6. An action **for redemption** may be brought by mortgagor, or by almost any one interested in the property (*e.g.* subsequent mortgagee, reversioner, jointress, judgment creditor, &c.), and plaintiff, as we have seen, is entitled therein to an order for sale in lieu of redemption, subject to terms imposed by Court.

The equity of redemption (since Land Transfer Act, 1897, through personal representative) descends to heir or under a will passes to devisee. Formerly, the heir or devisee was in general entitled to have the mortgage debt discharged out of personalty; but by the three Real Estate Charges ("Locke-King") Acts, 1854, 1867, 1877, he takes *cum onere*, *i.e.* the mortgaged land itself is primarily liable, whether freehold, copyhold, or leasehold (1877), unless deceased mortgagor expressed a contrary intention by clear reference to mortgage debt, and not by mere general direction for payment of debts. The second and third of these Acts fix the same rule also as to another incumbrance on land, viz. vendor's lien for unpaid purchase-money, where lands were

purchased by a deceased testator (1867), or intestate (1877).

The **equity of redemption** is alienable (i) by subsequent mortgage, or (ii) by sale.

7. Every "**Second Mortgage**" after a legal mortgage can clearly be only mortgage of the equity of redemption. Such "puisne" mortgagees rank in order of priority, for *qui prior est tempore, potior est jure* (that which is first in time is first in right). But this is subject to doctrine of "**Tacking,**" *i.e.* any mortgage has priority if tacked to legal mortgage; it is, however, essential for the doctrine to be applicable that *the later advance was made without notice of intermediate mortgage.* The notice to prevent "tacking" must have occurred when the third mortgagee made the advance. If obtained subsequently its operation to prevent tacking is negatived (*Marsh* v. *Lee*), but even though the first mortgage was to secure "further advances," tacking is not permissible if notice is obtained (*Rolt* v. *Hopkinson*). This has been called the *tabula naufragii* of a puisne mortgagee by which, if security is insufficient for all, third mortgagee, *e.g.* may "squeeze out" second. The principal cases of tacking are:—(i) when third mortgagee without notice at time he lent his money of second buys in first mortgagee; (ii) when first mortgagee makes further advance without notice of second; (iii) when first mortgagee without notice lends again without security and then

recovers judgment, he may tack judgment-debt to mortgage. But judgment creditor, as such, cannot buy in mortgage and tack it to judgment-debt, because he did not lend on security of land (*Brace* v. *Duchess of Marlborough*). The V. P. A. abolished tacking, but the results being found inconvenient, it was re-introduced the next year by L. T. A., 1875. It is, however, practically abolished in Yorkshire and the Metropolis by the Yorkshire Registries Act, 1884, and the Land Transfer Act, 1897, respectively. By St. of Clandestine Mortgages, 1692, mortgagor loses equity of redemption if he mortgages without giving notice of any prior mortgage, but other mortgagees, &c., may still redeem: equity of redemption, however, in such cases is usually of little value. Tacking applies to "Building Society Mortgages" in the same way as ordinary mortgages though not to certain of the Statutory mortgages.

8. **Sale of equity of redemption** may be (i) to a *stranger*, who of course takes *cum onere* with right to redeem and thus get legal estate in mortgaged property, but liability to foreclosure by mortgagee and consequent loss of estate entirely, while mortgagee may still sue original mortgagor on his personal covenant usually contained in the mortgage deed, or (ii) to *mortgagee*, who by express intention in purchase-deed (and sometimes by intention otherwise expressed) may keep alive his mortgage to afford him priority

over subsequent mortgagees (*Adams* v. *Angell*; *Whiteley* v. *Delaney*).

9. Mortgages may also be liable to "**Consolidation,**" *i.e.* right of mortgagee holding mortgages on two or more estates of same mortgagor to decline redemption of one without redemption of all (*Vint* v. *Padgett*). *E.g.* A. mortgages X. to B., and Y. subsequently also to B. B. may consolidate X. and Y. and refuse leave to A. to pay off on one unless he also pays off on the other. By C. A., sec. 17, consolidation is abolished in mortgages made after 1882, unless the right of consolidation is expressly reserved; but mortgagee, being in position of creditor, can generally insist on such provision. As to consolidation (i) there cannot be consolidation unless there has been default on *both* securities (*Cummins* v. *Fletcher*); (ii) if the later mortgage was created, or both for first time came into hands of same mortgagee, after mortgagor had parted by sale or mortgage with equity of redemption of the earlier, no consolidation arises (*Minter* v. *Carr*). Subject to these rules consolidating mortgagee need not be original mortgagee, but may be transferee of one or both mortgages; *e.g.* A. mortgages Blackacre to B. and Whiteacre to C., and then B. and C. transfer their mortgages to D.; D. may consolidate against A. If, however, A. mortgages Blackacre to B. and then A. assigns the equity of redemption in Blackacre to X., and A. also mortgages White-

acre to C., and B. and C. transfer their mortgages to Z., Z. cannot consolidate against X. (*Jennings* v. *Jordan*). Again, if A. mortgages Blackacre to B. and Whiteacre to C. and assigns equity of redemption in Whiteacre to X., B. and C. transfer their mortgages to Z., Z. cannot consolidate against X. (*Harter* v. *Colman*). On the other hand, if A. had in the last-mentioned example assigned the equity of redemption in "both" Blackacre and Whiteacre to X., Z. could have consolidated against X. (*Pledge* v. *White*).

In Tacking, we see, there are at least three or more mortgages on *same land*, one only being legal mortgage. In Consolidation there are two or more mortgages on *different* lands of *same* mortgagor, originally made to, or by transference coming to hands of, same mortgagee. If there is "notice" it is fatal to the doctrine of tacking operating, whereas it does not affect consolidation.

Transfer of mortgage may be (i) by mortgagee with or without consent of mortgagor; (ii) compulsory at instance of mortgagor or other person entitled to redeem, in lieu of re-conveyance; when (by C. A. and C. A., 1882) the other mortgagees in priority, and lastly the mortgagor, have right of nominating the transferee. Transfer of legal mortgage comprises (i) assignment of mortgage-debt, and (ii) conveyance of legal estate as

security subject to proviso for redemption, (iii) generally in practice transfer of *power of sale* by mortgagee, though this last is perhaps not strictly necessary (*Rumney and Smith's Contract*).

When the debt has been by any means repaid, the mortgagor is entitled to have (at his own cost) *re-conveyance of legal estate now held in trust for him by mortgagee* or (if mortgagee is dead) by his personal representative.

Mortgage of copyholds is usually completed by surrender to use of mortgagee with condition avoiding the surrender on payment of principal and interest on the fixed day, but without actual admittance. The conditional surrender is usually preceded by a deed of covenant to surrender. Such covenant would then be a conveyance and the C. A., secs. 19 to 24, imports the usual powers of a mortgagee to a deed of surrender of copyholds, also the covenants for title implied by C. A., sec. 7.

Mortgage of leaseholds may be (i) by assignment of whole residue of term, with proviso for redemption and re-assignment; (ii) by under-lease of residue of term less a day or two, with proviso as before, and declaration that after sale or foreclosure mortgagor shall stand possessed of this last day or two in trust for mortgagee; (ii) was till lately commoner, as it is a serious objection to (i) that it causes privity between lessor and mortgagee by assignment, rendering latter liable

for rent and covenants; while in (ii) mortgagee, being merely under-lessee, incurs no such liability; on the other hand (i) obviates risk of trustee in bankruptcy of mortgagor disclaiming and rendering mortgagee liable as original lessee or assignee under the provisions of the Bankruptcy Act, 1914, sec. 54, which, notwithstanding relief afforded by C. A., sec. 14, amended by C. A., 1892, sec. 4, is undesirable for the under-lessee. In either form, mortgagor covenants with mortgagee to pay rent, perform covenants, and thus prevent forfeiture; but this covenant may be implied under C. A.*

(2) **EQUITABLE MORTGAGES** of form (i), viz. **mortgage of equity of redemption,** or second and other "puisne" mortgages, have already been described. Form (ii) by **deposit of title-deeds** is very common (*Russel* v. *Russel*), but generally intended for merely temporary purposes. Where not accompanied by writing it was once doubtful whether it was valid under St. of Frauds, 1677, sec. 4, which requires writing for alienation of "any interest" in land, but the statute was decided not to apply to deposit merely by way of security, and such securities were upheld, and can be enforced by foreclosure, or under order of Court (C. A.) by sale, or where "just or convenient" (J. A.) by appointment of receiver. (iii) By **agreement** or **memorandum of charge** in

* *v.* p. 128.

writing signed in accordance with the Statute of Frauds, 1677, sec. 4.

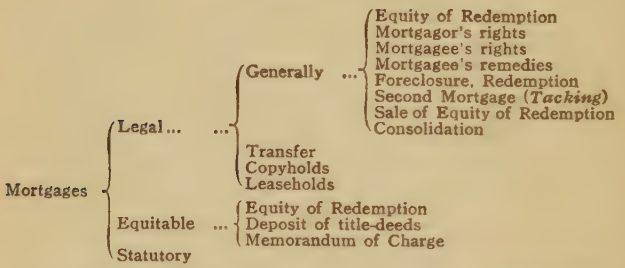
As statutory power of sale under C. A. does not extend to any equitable mortgage *not made by deed*, mortgagee desirous to convey legal estate must obtain *power of attorney* from mortgagor (*Hodson and Howe's Contract*); unless the agreement or memorandum contains a *declaration* appointing mortgagor trustee for mortgagee, when mortgagee can appoint new trustee under T. A., 1893, sec. 12, who will thereby take the legal estate (*London and County Banking Co.* v. *Goddard*). On equitable mortgage of lands by deposit of title-deeds reasonable notice, however short, of intention to pay off, suffices (*Fitzgerald's Trustee* v. *Mellersh*).

(3) **STATUTORY MORTGAGES.**—In a Statutory M. under C. A. following covenants are implied on mortgagor so conveying (*a*) covenant by mortgagor to repay principal at stated date and interest thereon while unpaid at agreed rate; (*b*) that mortgagee will reconvey legal estate on repayment of principal and interest. A statutory mortgagee has benefit of C. A., secs. 19 to 24, and may transfer on recovery by statutory forms (C. A., sch. 3).

County Councils, Municipal Boroughs (both County and Non-county), Urban, Rural, and Parish Councils, are (generally speaking) empowered to mortgage corporate lands, buildings, local rates for legalized purposes. The mort-

gages are usually in statutory form, and previous sanction of Local Government Board is necessary in certain cases, also the consent of County Council.

TABLE J.



N.B.—By the Courts (Emergency Powers) Acts, 1914–17, the powers of a mortgagee, when mortgage was executed before August 4, 1914, to take possession, appoint a receiver, sell, or foreclose, are subject to certain special restrictions. Thus a mortgagee cannot take possession, appoint a receiver, or sell without leave of the Court. The Court may, in its discretion, if the Court considers that time should be given to the mortgagor on the ground that he is unable to make the payment by reason of circumstances attributable directly or indirectly to the war, defer the operation of any of the above remedies for such time and subject to such conditions as the Court shall think fit. Wider relief is given to officers and men of His Majesty's forces. These Acts remain in force until the termination of the war and for six months thereafter.

By the Increase of Rent and Mortgage Interest (War Restrictions) Acts, 1915–19, in case of legal mortgages on dwelling houses in London where rateable value does not exceed £70 or elsewhere in England where rateable value does not exceed £52, the mortgagee cannot, except in certain cases stated in the Acts, call in his mortgage or proceed in any way to enforce it if interest is paid and the covenants, other than for payment of the mortgage money, are performed and the property is kept in repair; nor can the mortgagee increase the rate of interest until the termination of the war and six months thereafter. After that date and up to Lady Day, 1921, the interest can be increased ½% per annum if rate when so increased is not over 5%. These Acts continue in force until Lady Day, 1921.

CHAPTER XI.

LIMITATION AND PRESCRIPTION.

* *Refer to Table K on page* 161.

INVESTITIVE and transvestitive facts of ownership include those by *operation of Law*, and by *act of parties*. Those arising by operation of Law chiefly * include (1) **DEVOLUTION,** already considered, as involved in the very nature of estates of inheritance and similar interests; (2) **STATUTORY LIMITATION**; and (3) **PRESCRIPTION.**

(1) **Devolution** is considered in Chapter IV., page 63.

(2) "**LIMITATION**" in respect of estates given by deed or will is "marking out" *quantum* of estate. In Statutes of Limitation, it is "marking out" the period at end of which an unasserted right becomes extinct or dormant. Indirectly this may raise a right in another, *i.e.* in an adverse claimant in possession. Thus, if A. is in actual possession of land really belonging to B., professing to hold merely for himself and not for B., and B. for a certain period does not assert

* Other instances of transmission by Law are noted at pp. 56, 57.

his right, B.'s right at length expires, and A.'s occupation ripens into ownership. This may be called "*Negative* Prescription," its essence lying in the *omission* of B. to assert his right in time. "*Positive* Prescription," on the other hand, is *direct, i.e.* from enjoyment for a certain period the Law infers a lawful beginning of title. Statutes of Limitation relate to *Corporeal* hereditaments, and many *Incorporeal* ones, including Rents of all kinds. Prescription relates to *Profits à prendre, Easements,* and the like.

Statutes of Limitation relating to estates and interests in land are chiefly four:—(i) The **Crown Suits** or **"Nullum Tempus" Act, 1769,** and amending Acts, relating to rights of the *Crown* in land; (ii) **R. P. L. A., 1833,** relating to *lands* and *rents* other than rents reserved on lease for years, as amended by other Acts, of which the chief is (iii) **R. P. L. A., 1874;** (iv) **Civil Procedure Act, 1833,** relating (*inter alia*) to "rent upon an indenture of demise."

(i) The C. L. maxim *Nullum tempus occurrit regi* (no time runs against the King) is broken in upon by the **Crown Suits Act, 1769,** which bars right of Crown to recover land, rents, and profits, after **sixty** years' adverse possession by a subject, except as to franchises.

(ii) **R. P. L. A., 1833,** fixed a statutory period of twenty years, cut down by (iii) R. P. L. A., 1874 (which came into effect January 1, 1879), to **twelve** years for recovery of *land, rents, other*

sums charged upon lands, and legacies. The period runs from *first accrual* of right of action to person barred or other through whom he claims; but if estate at that date were in remainder or reversion, and owner of particular estate not in possession at its determination, then **twelve** years after accrual of right of action to such owner of particular estate, or **six** years after right of possession accrued to remainderman or reversioner, whichever longest. *E.g.* A. died in May, 1879, devising X. to B. for life, remainder to C. in fee; in May, 1880, D. took wrongful possession of X., and B. never sued in ejectment, and died in March, 1885: C. must sue in or before May, 1892 (1880 + 12), which is longer than (1885 + 6). If at accrual of right of action, claimant was under disability of infancy or lunacy, **six** years from his death or cessation of disability are allowed provided the whole time from accrual to action does not exceed **thirty** years. Coverture formerly constituted a disability, but the M. W. Property Act, 1882, impliedly revoked this by permitting a married woman to sue and be sued as a *feme sole*. It may, however, perhaps, be a bar where the property is not held to the wife's separate use. Absence of the "claimant" beyond seas is not now a disability, the Mercantile Law Amendment Act, 1856, having removed this disability as regards actions relating to personal estate and the R. P. L. A., 1874, as regards actions relating to realty.

A mortgagee may sue for possession or for foreclosure within **twelve** years after last payment on account of principal or interest, or written acknowledgment made or given by mortgagor or by some person liable to pay on his behalf as between himself and mortgagor, *e.g.* mortgagor's solicitor (*Sutton* v. *Sutton*, *Harlock* v. *Ashberry*). If mortgagee first obtains merely foreclosure judgment, this is a new title, and if he has not obtained actual possession, he may sue for this within another period of **twelve** years from foreclosure judgment (*Heath* v. *Pugh*). A mortgage debt or a legacy is deemed satisfied after twelve years from last payment on account or written acknowledgment. Hence, mortgagee cannot sue on personal covenant in mortgage deed or collateral bond given by mortgagor after **twelve** years (*Fearnside* v. *Flint*), even if mortgaged property is reversionary (*Kirkland* v. *Peatfield*), but if collateral bond is given by a third person then probably within twenty years (*Re Powers*, *Re Frisby*). Redemption action must also be brought within **twelve** years, and there is no extra time allowed under the Statute of Limitation, 1874, in case of any disability in a redemption action (*Kinsman* v. *Rouse*).

We have seen * that *base fee* is enlarged **twelve** years after death of protector of settlement.

As against a *cestui que trust* under a will or

* *v.* p. 42.

settlement the Statute of Limitation, 1874, does not run except in the case of money and legacies charged on *land*, which even if secured by express trust, are not recoverable after **twelve** years—an exception to the general Equity rule adopted in J. A., sec. 25, that "Time does not run in the case of an express trust"; and again in cases falling under T. A., 1888, sec. 8, by which a trustee may plead the statute in action against him by *cestui que trust* for loss by innocent (not fraudulent) breach of trust. In case of *concealed* fraud, right to sue for recovery of land or rent withheld by such fraud of person who sets up the St., or of one through whom he claims, accrues from time when (1) it was *first discovered*, or (2) by *reasonable diligence* might have been discovered.

Thus, the group of statutes under (ii) and (iii) relate to recovery of land, mortgages, quit-rents, rent-charges, and legacies charged on land. But now no title by limitation prevails against registered absolute title.*

(iv) The **Civil Procedure Act, 1833,** fixes period within which action for rent on lease for years or other specialty contract may be brought within **twenty** years, if the rent is reserved not on a lease or by specialty contract, **twelve** years is the time limit, R. P. L. A., 1874, but as long as the tenancy continues the twelve years do not commence to run (*Grant* v. *Ellis*); six years' arrears

* *v.* p. 184.

of rent are recoverable, R. P. L. A., 1833, unless the tenant has covenanted to pay it by deed when twenty years' arrears are recoverable (C. P. A., 1833). On an agricultural holding within Act of 1908, only one year's arrears are recoverable by distress; and if lessee be bankrupt, only six months' arrears are distrainable (Bankruptcy Act, 1914).

All the Acts summarized under (i), (ii), and (iii), extinguish the *right* at the end of the period, and it cannot be revived by any subsequent acknowledgment in contradistinction to the Statute of Limitations affecting personal property where the remedy only is barred.* On the other hand rights on specialty contract under Civil Procedure Act, 1833, at the end of the period (just as on simple contract under 21 Jac. I. Limitation Act, 1623) merely become dormant, *i.e.* right of action is barred, but may be revived by written promise to pay, as well as by subsequent payment on account.

A statute-barred debt is revived by (*a*) acknowledgment of debt by debtor (if given by one of several co-debtors it only revives debt as against the one giving it) which must be in writing and be signed by the person chargeable with the payment of the same (Lord Tenterden's Act, viz. Statute of Frauds Amendment Act, 1828, Mercantile Law Amendment Act, 1856), (*b*) part

* See An Epitome of Personal Property Law.

payment of the debt (in case of co-debtors subject as above), (*c*) payment of interest (in case of co-debtors subject as above), (*d*) issue of a writ of summons, renewing the writ after first twelve or subsequent six months (Order 8, v. 1) to prevent its lapse, (*e*) by registration in either the Yorkshire, Middlesex, or Land Registries.* *Dower* may be claimed within twelve years, but six years' arrears only can be recovered (R. P. L. A., 1833). *Advowsons* must be claimed within the time three adverse incumbents are in occupation, or sixty years, whichever is the longer, but not in any case after the lapse of 100 years (R. P. L. A., 1833).

(3) **PRESCRIPTION** depends partly on C. L., partly on Prescription Act, 1832. It is right to easements or profits *à prendre* actually enjoyed for a certain time. To "prescribe" is to claim this right *in solo alieno*. This may be by alleging enjoyment of right (*a*) by self and ancestors for the period of legal memory, viz. since accession of Richard I., of which, however, twenty years' undisputed enjoyment is *primâ facie* evidence; or (*b*) by self and predecessors in title to land to which right is appendant or appurtenant. This is termed "prescribing in a que estate," *i.e.* on ground of estate which (que) estate has been held by claimant and his predecessors. In case (*b*), the requisite periods are thus fixed by Prescrip-

* *v.* p. 184.

tion Act:—(1) **thirty** years' uninterrupted enjoyment gives *primâ facie* right to Profits *à prendre*, which after **sixty** years is indefeasible, unless incompatible with some proved agreement; (2) **twenty** and **forty** years similarly suffice for right to Easements, *e.g.* ways or watercourses; (3) **twenty** years alone gives indefeasible right to Light, unless the right depends on written agreement.* To illustrate:—if A. proves that he has enjoyed a right of way across B.'s land without interruption for twenty years, and nothing further is proved on the other side, A. succeeds; but if B. proves that thirty-five years ago the way was blocked against A. or his predecessor, and A. cannot controvert this evidence, B. succeeds; and B. equally succeeds if he can show that use of the way by A. depended on a written licence given by B. or his predecessor to A. or his predecessor for a limited period now expired. Easements in general can be acquired only by or under name of tenant in fee as against adjoining owner (*Kilgour* v. *Gaddes*), but as to Light, if A. and B. are adjoining tenants of C., after twenty years A. acquires for self and successors absolute indefeasible title as against both B. and C. and their successors in title (*Fear* v. *Morgan*).

* By the Courts (Emergency Powers) Act, 1916, the Court can suspend for a time, not later than six months after termination of the war, the period of prescription running in the case of light, when a person is prevented from erecting a building owing to circumstances or Government orders connected with the war.

No enjoyment for periods respectively less than the above *per se* affords any presumption in favour of the claimant, but such lesser enjoyment, along with other circumstances, may be evidence (apart from the statute) from which a jury may infer existence of right.

Transmission of estate or interest by *act of parties* includes the cases of (1) **WILLS**, and (2) **CONVEYANCES** *inter vivos*. A will operates as a conveyance, vesting estates in *freehold* and *chattel* interests in executor, and through him in devisee and legatee respectively, while even on death of testator since L. T. A., 1897, it still vests devise of *copyholds* directly in devisee, but freeholds vest in devisee (*a*) on simple assent of executor, (*b*) by his conveyance, or (*c*) by Order of Court made after one year from death. Chattel interests vest in legatee by executor's assent only. Being, on the whole, of a simpler nature than other conveyances, wills may be first considered. (Refer to chapter on Wills, p. 162.)

TABLE K.

Investitive and transvestitive facts of ownership	Operation of law	Devolution (intestacy).	
		Limitation (*inter vivos*)	
		Prescription (*inter vivos*)	
	Act of parties ...	Will (death testate)	
		Conveyance (*inter vivos*)	

CHAPTER XII.

WILLS.

* *Refer to Table L on page* 178.

THE steps by which land held in fee became devisable have already been traced.* A will of (**A**) **FREEHOLD LANDS** must be executed in accordance with the joint provisions of the St. of Wills, 1540, St. of Frauds, 1677, and Wills Acts, 1837 and 1852, (I) **FORMALITIES,** (II) **CONSTRUCTION,** (III) **CLAUSES.**

I. **FORMALITIES.** (*a*) **Writing:** the St. of Wills, 32 Hen. VIII., 1540, required *writing;*

(*b*) **Witnesses:** the St. of Frauds, 1677, required for will of lands *attestation* by *three* or *four* "credible" witnesses, reduced by W. A., 1 Vict. c. 26, 1837, to *two*, *both* being present when the testator makes or acknowledges his signature. An interested witness was not credible under St. of Frauds, and rendered the will void; under W. A. the will is valid, but any benefit (devise, legacy, &c.) given to a *witness*, or *husband* or *wife* of witness, fails (W. A.,

* *v.* p. 49.

1837, sec. 15). A direction to pay, or charge of, debts due to a creditor is not affected by his being witness, and an executor may be witness, though he thereby loses any benefit given him in the will.

(*c*) **Signature:** the testator must sign the will *himself* or some one else may sign for him providing the actual signatory signs *in the testator's presence* and *by his direction* (W. A., 1837, sec. 9).

(*d*) **Position of Signature:** the signature of the testator or actual signatory must appear at the *foot* or *end* of will (W. A., 1852): any writing *below* the signature is inoperative.

(*e*) **Attestation:** the testator must sign or acknowledge the signature in the presence of the two witnesses *both present;* the witnesses must sign *in the testator's presence* (not necessarily, but usually in practice) in each other's presence. No special form of attestation is necessary providing evidence that W. A., 1837, sec. 9, has been complied with is forthcoming. The three traps to be avoided are (i) the testator may sign his will beforehand (*e.g.* in the middle of the night, alone); it is then sufficient if he subsequently acknowledges the signature to the two witnesses: (ii) the two witnesses must both be present when the testator makes or acknowledges his signature: (iii) the witnesses may sign at different times, providing (ii) was complied with

and each of them signs in the testator's presence (*In the Goods of Allen*).

(*f*) **Infants: Soldiers and Sailors:** formerly a will of *personalty* could be made by a male after 14, or female after 12 years of age; by W. A. every will of an infant is void except a will disposing of personal estate made by any soldier being in actual military service or any mariner or seaman being at sea (W. A., sec. 11, as interpreted by Wills (Soldiers and Sailors) Act, 1918). Such will may be written and unattested, or even verbal before witnesses. By Wills (Soldiers and Sailors) Act, 1918, sec. 11 of W. A. is extended to any member of His Majesty's naval or marine forces, not only when he is at sea, but also when he is so circumstanced that if he were a soldier he would be in actual military service; and the power of testamentary disposition given by section 11 of W. A. is extended to real estate. "Soldier" includes a member of the Air Force.

(*g*) **Married Women:** the will of a married woman till lately depended chiefly on St. of Wills. She can devise (1) separate property, (2) as executrix, (3) as donee of a power exercisable by will, and (4) by licence of her husband. As to (1) the amount capable of falling under this head is enlarged by M. W. P. A. (2) only enables her to transmit her position of executrix under another will to her own executor. (3) is

referred to again, *infra*.* (4) enables her to deal with property which, without being strictly to her separate use, her husband has permitted her to enjoy; but he may revoke this licence, even after her death, at any time before probate. Her will once made holds good to pass even property acquired after her husband's death, without necessity of "republication," a formality formerly required by reason of the decision in *Re Price*, but abolished by M. W. P. A., 1893, sec. 3.

(*h*) **Codicil.** Additions can only be made by Codicil executed like the will, of which for most purposes it forms a part; but it revokes the will so far only as its provisions conflict with the will. Similarly, obliterations or alterations should be "initialed" by testator and witnesses.

(*i*) **Executors.** A will does not for its validity require executors; if there be no executor, or none who accepts, an administrator *cum testamento annexo* may be appointed, who may be heir, residuary devisee, or legatee, &c. An infant may be appointed executor, but cannot act until he attains his majority; a married woman may be an executrix (M. W. P. A., 1882). It was held that she could not convey land vested in her as a trustee (unless she was a "bare trustee" only) except by deed acknowledged in

* *v. p.* 170.

which her husband joined (*Harkness & Allsopps' Contract, Brooke & Fremlin's Contract, Howgate & Osborne's Contract*). But by M. W. P. A., 1907, sec. 1, sub-s. (1), it is provided that a married woman can, without her husband, dispose of, or join in disposing of, real or personal property held by her solely or jointly with any other person as trustee or personal representative in like manner as if she were a *feme sole*. Any will of realty or personalty now requires probate or "Letters of Administration."

(*j*) **Revocation.** Revocation of a will takes place (1) by *subsequent* will or codicil expressly or by necessary implication revoking, notwithstanding the testator may not have so intended (*Collins* v. *Elstone*); (2) by subsequent *marriage* (not, as formerly, marriage of man and birth of child); (3) by *intentional defacement* or destruction by testator or by some person in his presence and by his direction. But a will merely appointing under a power, where property would in default of appointment have gone to some other than heir, next-of-kin, or personal representative, is not revoked under (2); under (3) both *intentional* and *actual* defacement are essential; symbolical destruction will not avail, if the will continues in unimpaired existence. Disappearance of a will known to have been executed affords a *presumption* of its revocation, but this may be rebutted and probate granted on clear proof of (a) *contents* and (b) testator's

intention of dying *testate* as to the same (*Sugden* v. *Lord St. Leonards*).

A will of (B) **COPYHOLDS** is similar to one of Freeholds (W. A., 1837, sec. 3), but must not interfere with any custom of the manor appertaining to the lands.

A will of (C) **PERSONAL PROPERTY** may be made either (*a*) according to the general law relating to freehold lands (W. A., 1837) or (*b*) according to the provisions of the Wills Act, 1861 (Kingsdown's Act) which enables wills of British subjects *abroad* to be validly made to pass personalty in England, including leaseholds (*Re Watson, Pepin* v. *Bruyère*), in one of three ways, viz. (i) according to the law of the country where the will was *made;* (ii) of the testator's then actual *domicile;* or (iii) of his domicile of *origin*.

But any will of freehold or copyhold lands must be executed according to the *lex loci rei sitæ*, so that a will of freehold or copyhold lands in England, even when made by a foreigner resident abroad, must be executed according to W. A., 1837, and amending Acts; except that a will executed according to English law will pass lands in *Scotland*.

A foreigner's will of leaseholds in England must be made according to English law, and his will of pure personalty in England must be made according to the law of his domicile.

II. **CONSTRUCTION.** Wills have always been construed more liberally than deeds, as a testator

is taken to be *inops consilii*, though wills of land should generally be made under legal advice. The first maxim of the Courts is that the *apparent intention* of the testator is to be effectuated as far as possible. The second maxim is that *technical* words are in general to be construed *technically*, unless otherwise explained by the context. Thus the few simple words, "I give everything to A., and make him executor," signed and witnessed, are enough to pass fee simple of all lands and make A. absolute owner of all personalty. "I devise X. to A. and his heirs," would *primâ facie* give A. fee simple; but if testator "is his own lexicographer," and clearly explains that by "heirs" he means direct descendants only, the devise might be construed as estate tail. "Issue" strictly means descendants, however remote, but it is a very flexible word, and easily confined by the context to children (*Macgregor* v. *Macgregor*). A devise to illegitimate children *eo nomine* is illegal, except of the testator himself (*Occleston* v. *Fullalove*). "Wife" means the wife at date of will.

Extrinsic evidence is admissible in construction of wills only to ascertain meaning of *latent* (not patent) ambiguities; thus a devisee's name shown to be inadvertently misquoted may be corrected (*In the goods of Boehm*).

The reforms made by W. A. mostly tend to

more *liberal interpretation* of language. They are as follows:—

1. **Exceptions to Lapse.** Lapse is failure of devise or legacy by death of devisee or legatee *before* testator. The lapsed gift goes to residuary devisee or legatee, if any; if none, to heir or next-of-kin, not (as formerly) to heir or next-of-kin in first instance (W. A., 1837, sec. 25). Two exceptions to the rule of lapse were made by W. A., 1837, by which there is *no lapse* (1) of estate tail devised to any devisee predeceasing testator, but leaving issue surviving testator (sec. 32); nor (2) of gift of realty or personalty for more than life estate or life interest to *issue of testator* predeceasing testator, but leaving issue him surviving, devisee or legatee in case (2) being (by a generous fiction) deemed to have died immediately after testator (sec. 33). Hence, under (1), it has been held that husband of devisee in fee predeceasing testator, but leaving heritable issue him surviving, was tenant by curtesy (*Eager* v. *Furnivall*). And, under (2), it is evident that, if devisee or legatee has made a will, the property thus saved from lapse will pass under it, whether to one or more of his surviving issue, or otherwise.

2. **Speaking from death.** A will speaks from death of testator as to property and therefore passes all property to which he is entitled at his death; not, as formerly, only what he had at date

of his will and continued to keep throughout till his death (W. A., 1837, sec. 24).

3. **General devise.** Since W. A., 1837, sec. 26, this operates (a) to pass copyholds and leaseholds under word "lands" (not, as formerly, merely if testator had no freeholds (*Wilson* v. *Eden*)) and *primâ facie* customary freeholds under word "freeholds," and by sec. 27 (b) to exercise a general (not special) power of appointment. Hence, a married woman's will professing to devise all her "property," she having no separate estate, may be effectual, if she has a general power of appointment, though the will does not expressly refer to it, unless the deed giving her the power expressly requires special reference thereto as essential for its exercise (*Phillips* v. *Cayley*). Since 1897, property appointed by will under general power vests in donee's executor, as though actually property of donee, thus passing indirectly through executor to appointee.

4. **Words of Limitation.** It has been already noticed in Chapter III. that a devise without any words of limitation *primâ facie* passes fee simple, and that words expressing intention, without being technical words, suffice to give an estate tail (W. A., sec. 28). If freehold is devised without words of limitation to trustees, they similarly (in most cases) take fee simple; not, as formerly was sometimes held, a "determinable fee," or term of years determinable on fulfilment of the trust purposes (sec. 31).

5. **Indefinite failure of issue.** Where realty or personalty is left to one, and on "failure of issue" or "dying without issue," then over to another, this refers to failure of issue at or before the death of the first donee, and not (as formerly) to "indefinite failure of issue," *i.e.* failure of issue of donee at any future time after his own death (sec. 29). The result of the former rule was that, before 1837, such devisee took an estate tail by implication, while such legatee took the bequest absolutely, the gift over failing for remoteness. Now the executory devise or bequest over is determined at latest at death of first donee; and we have already seen* that by C. A., 1882, sec. 10, an executory devise over fails sooner, if issue of first donee attain 21 in his lifetime.

6. **Rules.** These five provisions are all subject to any "*contrary intention*" in the will. (4) is moreover in part subject to the Rule in *Wild's Case*, by which, if the gift be "to A. and children," and he has children living at date of will, then, in the absence of contrary intention, the words are words of purchase and not of limitation, and children take as joint-tenants along with A.

If wasting (*e.g.* leaseholds) or reversionary property is included in *residuary* personalty for benefit of *successive* beneficiaries, both must, by

* *v.* p. 93.

Rule in *Howe* v. *Dartmouth*, be converted into permanent and immediately profitable securities, unless by express or clearly implied direction the residuary legatees are to take such property in its identical form (*Grey* v. *Siggers*).

Property and income can be tied up by will only so far as permitted by Rule against Perpetuities and Accumulations Acts, 1800 and 1892. Also, if A.'s will vests property in trustees for accumulation till his son B. attains age of 24 without giving any interest in this property to other person or persons, B. on attaining 21 is at once entitled to the property (*Saunders* v. *Vautier*).

On devise or bequest of *corpus* to a class, *e.g.* "the children of A.," only children (if any) living at testator's death take; but if none are living at this date, then and then only children subsequently born will take (*Viner* v. *Francis*). On similar bequest of *income* all children, whether born before or after testator's death, will share alike (*Re Wenmoth*).

It is a breach of trust for executors to carry on their testator's business, except (*a*) temporarily for purpose of winding up or of sale as a going concern, or (*b*) if expressly authorized. If executors carry on the business of the testator, the creditors of the testator have priority of payment out of testator's estate as against the executor's right of indemnity for debts incurred in carrying on the business and the claims of

such new creditors, unless the old creditors have expressly assented to the business being carried on by the executors (*Dowse* v. *Gorton*, *Re Oxley*).

III. **CLAUSES.** As every combination and variety of estates and interests can be created by will, it is capable of becoming a long and complicated instrument. Many provisions formerly set out in full may be simplified or implied by the above rules of W. A., or by later enactments, which are mainly Six:—

(i) **Investment of trust-funds.** If there is no express provision in will to contrary, these may be invested in Public Funds, Mortgage in U. K., and various other securities specified in T. A. (T. A., 1893, sec. 1) and the Colonial Stock Act, 1900. Company Shares require express authorization in Will or Settlement. But retention in unauthorized investment is not *per se* breach of trust (T. A., 1894).

(ii) **Management of land and maintenance.** During infancy of devisee, by C. A., sec. 42, trustees under will have power to *manage* property in ordinary course; and (the land being deemed "settled land") can exercise power of leasing vested in the infant as limited owner by S. L. A. They can under C. A., sec. 43, also apply income for infant's maintenance, education, or benefit, and *accumulate* the unapplied part at compound interest for person eventually entitled. This does not, without express provision in the Will, justify *Advancement*, *i.e.*

paying out a lump sum of *corpus* for starting infant in profession or trade, &c.

(iii) **Power of Sale.** By L. P. A. A., where a testator has *charged* lands with payment of debts or legacies, if (1) he has devised them to trustees for his *whole* estate or interest, the *trustees* have an implied power of sale or mortgage for raising the needful sum; or if (2) he has not so devised to trustees, the *executors* have a similar power. The implied power of sale given to executors by this Act lasts *primâ facie* for 20 years, the utmost limit of a specialty debt if not revived or extended by part payment or acknowledgment (*Re Tanqueray-Willaume and Landau*). The Act does not apply to *administrators* (*Re Clay and Tetley*), nor does the limit of 20 years apply to sale of leaseholds (*Venn and Furze's Contract*). In the case of persons dying after the 1st of January, 1898, by L. T. A., 1897, the personal representative has power to sell and administer land, except copyholds, subject to Order of Assets; and, with assent of legatee and on notice to beneficiaries of residue, may appropriate part of land to satisfy legacy or share of residue. By C. A., 1911, if there are two or more executors, the executors who have proved the will can convey lands without joinder of those who have neither proved nor renounced probate. An order granting administration is a judicial act, and therefore if an administrator sells realty belonging to the estate, the purchaser obtains a

good title, even though the letters of administration are afterwards revoked owing to the discovery of a will appointing executors (*Hewson* v. *Shelley*).

(iv) **Compounding debts, &c.** Executors or trustees acting in good faith may, under T. A., 1893, (*a*) pay debts due *from* testator's estate on any evidence they think sufficient, and (*b*) *compound* or settle debts or claims due to it. If not acting in good faith, this would be *devastavit* (*i.e.* wasting the assets) in an executor.

(v) **Indemnity, &c.** By L. P. A. A. a trustee is *indemnified* against acts or omissions of his co-trustees (in absence of fraud or culpable negligence of his own); and by C. A., sec. 56, written receipt of trustees is *sufficient discharge* to person paying money or personal effects (*e.g.* cheque), and exonerates him from *seeing to the application* thereof. The decision in *Re Bellamy* that this provision was inapplicable to "trustees" is now overruled by T. A., 1893.

(vi) **Appointment of new trustees.** The provisions of T. A. have been noticed *; it is generally convenient in a will creating trusts to "nominate" the person who is to appoint under the Act.

An outline Will of simple and common type may be given, suitable for a testator who has little realty and leaves a widow and children.

* *v.* p. 108.

The trust for sale brings it under S. L. A., 1882-1884. The ordinary abbreviations are employed.

This is the last Will of me A. B. of ———. I revoke all former wills. I appt C. D. of ——— and E. F. of ——— (hinafter called "my trees"), exors and trees of this my will. I also appt my wife B. B. and sd C. D. joint guardians of my inft children. I BEQUEATH all my furniture, carriages, &c., to my sd wife absolutely, and also the sum of £——— to be paid within ——— months after my dth. I BEQUEATH the followg legies [free from legy duty],* viz. to G. H. £———, to J. K. £———, &c. I DEVISE and BEQUEATH the resue of my este and effts real and ponal UNTO AND TO THE USE OF my sd trees, their hrs exs and ads respy UPON TRUST to sell and convert the same into money, but with full power and discron to postpone such sale and convon so long as they think proper, and in the meanwhile to let any hrds unsold, and genlly to manage the same as they think fit, and after such sale and convon UPON TRUST after payment of all debts and expenses and legies afsd to invest the resue of the sd moneys in their own name [with the consent in writing of my sd wife, and after her dth at their own discron] in any investment in which trust funds may by any law for time being be invested [or in (*special investments, if any*)] with power to vary [with such consent or at such discron as afsd]. AND to stand possessed of such moneys or investments for the time being UPON the trusts followg, viz. IN TRUST to pay the income throf to my sd wife for life and after her dth IN TRUST for all or any

* Phrases or clauses in *square* brackets are inserted only if desired.

excluding others or other of my children [or remoter issue, such issue to take vested intts within twenty-one years after dth of my sd wife] in such shares and manner as my sd wife shall by deed or will appt. AND IN DFLT of appmt IN TRUST for all my children equally, who being sn or sns shall attn twenty-one, or being dr or drs shall attn that age or marry thrunder, if only one the whole in trust for that one child. [PROVIDED ALWAYS that no child or issue who shall take any pt of sd trust premes under appmt shall share in any unappd pt throf witht bringg share or shares appd into hotchpot and accountg for same.] AND I AUTHORIZE my sd trees with written consent of my sd wife, or after her dth at their discron to raise any pt or pts not exceedg (*e.g.* one-half, one-third, &c.) of the expectant share of any child or issue as afsd, and apply the same for his or her advancement or benefit as my trees shall think fit. AND IF no child of mine shall attn twenty-one, or being dr marry thrunder, then subjt to afsd trusts and powers, my trees shall hold sd trusts premes and income throf IN TRUST for [*e.g.* L., M., N., &c., equally, or] such pon or pons, and in such shares and manner as my sd wife shall by deed or will appt. AND IN DFLT of Appmt IN TRUST for pons or pon who wd at my dth have been entitled to my ponal este under Sts of Distribon if I had died inteste. And I declare that the staty power of apptg new trees of this my will shall be vested in my sd wife durg her life. In WITNESS whof I have set my hand to this my will the ——— day of ——— 19—.

Signed by sd testor in jt presence of us who in his presence and that of each other have hrunto sub-

(*Signature*)
A. B.

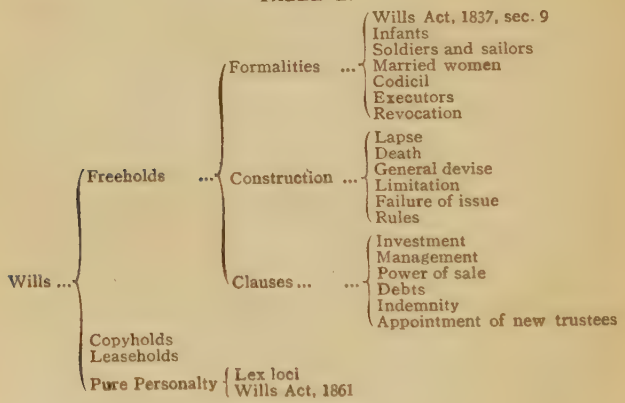
scribed our names as witnesses.

O. P.
Q. R.

The language is purposely shortened, and variations would be needed according to circumstances in other cases besides those in square brackets. If the testator's estate include copyholds, they should not be devised to executors, but a power given to sell them (which is a C. L. power), thus avoiding admittance of executors and expense of fine.

A will devising lands in "strict settlement" is, of course, much longer; its general framework may be deduced from the second abstract of settlement given in next chapter.*

TABLE L.



* v. p. 208.

CHAPTER XIII.

CONVEYANCES.

* *Refer to Tables M, N, on page* 197.

CONVEYANCES *inter vivos* are of many kinds. They may be divided into—First, those operating **AT C. L.**; including (1) **Feoffment,** (2) **Grant,** (3) **Lease,** (4) **Assignment,** (5) **Release,** (6) **Surrender:** Secondly, those operating **UNDER ST. OF USES;** including (*a*) **Bargain and Sale,** (*b*) **Lease and Release,** (*c*) **Covenant to stand seised,** (*d*) **Grant to uses:** Thirdly, those operating **UNDER OTHER STATUTES;** including (i) **Statutory Release,** (ii) **Statutory Grant,** (iii) **Registration.**

First, **CONVEYANCES AT C. L.**—(1) **Feoffment.** Before deeds were introduced the only method of transferring freeholds was by "feoffment" accompanied by "livery of seisin"; hence at C. L. corporeal hereditaments (in possession) were said to "lie in livery." The feoffment was the actual giving of a fief or feud (*feoffare* or *infeudare*), outwardly expressed by delivery of the seisin or actual feudal possession of the lands. The "livery" was "in *Deed*," by coming on the land, where feoffor put a clod, twig, or door-handle, &c., into hand of feoffee

before witnesses; or "in *Law*" by coming in sight of the land, where feoffor after uttering words of gift made feoffee enter and take possession, which he had to do during life of feoffor. By degrees the written and sealed evidence of this, called "Charter of feoffment," came to be itself termed a feoffment, and by R. P. A. every feoffment (except of infant in gavelkind) must be by deed. Feoffment is quite obsolete except in the case of an infant conveying gavelkind lands which he may do at 15 years of age, but in this case the feoffment is only binding on him if he received the full benefit of the conveyance (*Re Maskell and Goldfinch's Contract*).

(2) **Grant.** This was and is appropriate to conveyance of (*a*) *incorporeal* hereditaments, and (*b*) corporeal ones *not* in possession; *e.g.* easement, reversion, &c. A deed always was and is necessary. Although the word "grant" is often used in conveyances, there is no need therefor as the C. A., sec. 48, expressly enacts that the word "grant" is unnecessary to convey corporeal or incorporeal hereditaments.

(3) **Lease.** This is a grant out of *greater estate* of estate for life, term of years, or tenancy at will—generally of term of years, which (with exceptions already noted)* must be by deed. The technical "operative word" commonly used in it is "demise," which implies absolute† cove-

* *v.* p. 127. † *v.* p. 192.

nants of title and quiet enjoyment, unless expressly qualified. For essentials of a valid lease, see Chapter IX.

(4) **Assignment.** This is conveyance of subsisting *term of years* from lessee to assignee, or from one assignee to another, and by St. of Frauds, 1677, must be in writing and by R. P. A. by deed. A conveyance *of life estate* by tenant for life is also, but less properly, sometimes termed assignment.

(5) **Release.** This is a conveyance of estate or interest of releasor to releasee, who already *has some estate or interest* in same land; *e.g.* by remainderman to prior tenant, one joint-tenant to another, &c.: it is even at C. L. made by deed.

(6) **Surrender.** This is conveyance of *lesser estate* to owner of estate *expectant* on its determination; *e.g.* by tenant for term to reversioner; if express, it must be in writing (St. of Frauds, 1677) and by R. P. A. by deed. A "Release" and a "Surrender" effect therefore directly opposite results.

Secondly, **CONVEYANCES UNDER ST. OF USES.**—(*a*) **Bargain and Sale.** Before St. of Uses, 1535, if A. for pecuniary consideration contracted to convey land to B., Equity deemed A. seised to use of B. This use the statute of course "executed," or turned into legal estate. For a little while it became the favourite conveyance on sale of freeholds, as it avoided publicity, and did not require presence on or near the land,

like feoffment. This method of secret conveyance was abolished by St. of Enrolments in same year, which required bargain and sale of freeholds to be by deed enrolled within six months at Westminster, or with *custos rotulorum* of county.

(*b*) **Lease and Release.** This combination, said to have been invented in reign of Mary by Lord Norris and Serjeant Moore, evaded St. of Enrolments which applied only to *freeholds*. The so-called "Lease" was really Bargain and Sale under St. of Uses of term of one year, leaving reversion in fee to vendor, which, by a second deed (operating at C. L.) dated one day later, he "released" to purchaser. Such a Bargain and Sale of an interest less than freehold did not require enrolment, while the consideration could be made merely nominal (generally 5s.) and not really paid, yet it gave sufficient interest in the land to enable purchaser to become releasee of fee, and paying actual price thereon to get the whole fee simple. It remained the ordinary conveyance on sale, mortgage, &c., till 1841, when by statute a release alone expressed to be in pursuance of the statute was made sufficient; and in 1845 both Lease and Release and Statutory Release were practically superseded by enactment of R. P. A. that corporeal hereditaments should "lie in grant as well as in livery."

(*c*) **Covenant to stand seised.** Before St. of Uses, if A. in consideration of marriage or near kinship contracted to stand seised to use of B.

(wife actual or intended, child, or other kinsman), notwithstanding that in law no estate was transferred yet equity enforced the use, which later on the St. of Uses turned into legal estate. Though this conveyance, once used for settlements, is wholly obsolete, a grant to uses technically void for some flaw may sometimes be upheld as a covenant to stand seised, if the beneficiary is a near relative.

(*d*) **Grant to uses.** Obviously, by construction put on St. of Uses, this may be very widely employed for creating Powers, Springing and Shifting Uses, &c., and includes all ordinary conveyances now operating under the St.

Thirdly, **CONVEYANCES UNDER OTHER STATUTES.**—(i) **Statutory Release.** This we saw was ordinary conveyance from 1841 to 1845.

(ii) **Statutory Grant.** By R. P. A. corporeal hereditaments in possession were made to "lie in grant as well as in livery." The Statute, however, is "discretionary" not "compulsory" in its operation, permitting corporeal hereditaments to be conveyed by grant while not abolishing the older methods of conveyance at C. L. Practically, however (with the one exception of the use of a feoffment in case of infants conveying gavelkind lands, *Re Maskell and Goldfinch's Contract*), deed of grant by reason of its very obvious superiority over the older methods of

conveyance has become the universal conveyance on sale or mortgage, and in many other cases.

Conveyances at C. L., or under statutes other than St. of Uses, are said to be made with "transmutation of possession," *i.e.* of legal seisin; those operating under St. of Uses are also thus made, except Bargain and Sale and Covenant to stand seised, in both of which, as we have seen, there is no feoffee or grantee to uses in the first instance; the bargainor or covenantor "declaring" the use on his own seisin, which use the St. then executes. Hence, if a further use is declared, *e.g.* if A. bargains and sells to B. to use of C., or covenants to stand seised to use of B. to use of C., the use of C. is a "use upon a use" not executed by the St.; *i.e.* B. has the legal estate, but as trustee for C., who has the beneficial interest. Hence, too, conveyance by tenant for life under S. L. A. or by trustees of settlement having legal estate is made with transmutation of possession, but one by trustees not having legal estate, being appointment to new uses, is not so made.

(iii) **Registration.** By Land Transfer Act, 1875, titles may be officially examined and registered in Land Registry, as (1) **Absolute,** *i.e.* good against all the world except registered incumbrancers and *c. q. t.*; (2) **Qualified,** *i.e.* subject to other estates or interests specified on register; or (3) **Possessory,** *i.e.* subject to all adverse or dero-

gatory estates or interests (if any exist). The "Register" consists of three distinct divisions, (*a*) *Property Register* in which are registered particulars and situation of the lands, easements, rights, &c., relating thereto; (*b*) *Proprietorship Register* specifies whether title registered is absolute, qualified, or possessory; and (*c*) *Charges Register* specifies the incumbrances on the lands registered. Any registered proprietor is free to convey in ordinary way, but may also transfer by short form prescribed by Rules, transfer being entered on register, and a land certificate delivered to transferee and (on part-sale) to transferror also. Voluntary registration has the following effects: (1) with *Absolute* title, subject to (*a*) incumbrances entered on the register, (*b*) to interests which, by L. T. A., 1875, sec. 18, are declared not to be incumbrances, *e.g.* estate or succession duty, therefore usual twelve years' limit applies, see Finance Act, 1894, Customs Act, 1889, land tax, easements, mines and minerals, lease for twenty-one years or under, &c., (*c*) if a trustee, mortgagee, or other person not entitled for his own benefit, subject to all equities of other persons; (2) with *Qualified* title, similar to (1) above, except that enforcement of any right or estate excepted by Register is not to be prejudiced; (3) with *Possessory* title, similar to (1) above, except that enforcement of any right or estate adverse to first registered proprietor at time of registration is not to be

prejudiced. The Registrar of the Land Registry has power to hear and decide disputes in reference to registration of title. An appeal lies to Ch. D. Statutes of Limitation do not run in derogation of registered proprietor; fraudulent entries on register, however, are void notwithstanding registration. After registration all future dealings with the registered land may be effected by simple *transfer* in form under L. T. A. and Rules. No exemption of stamp duties is allowable (Stamp Act, 1891). Owing to trouble and expense of examination, and unpleasantness of publicity thus attached to blots on title, and other reasons, little use was made of this Act. Now, by L. T. A., 1897, and Rules, provision has further been made for compulsory registration of (1) *fee simple* in name of vendor, purchaser, trustee, mortgagee, or joint owners; (2) *settled land*, the latter in name of (i) tenant for life, (ii) trustees, or (iii) donee of overriding power over fee; (3) lease or underlease having forty years unexpired. Copyholds are incapable of registration, but manors, advowsons, rents, and other incorporeal hereditaments, may be registered, though this is not compulsory. Registration may be made compulsory for any county or part thereof by Order in Council approved by County Council and laid before Parliament. Various Orders have introduced this compulsory system into County and City of London, so that, for conveyances and assignments after 1897, in

the Metropolis, in order to obtain legal estate purchasers must be registered.

Dealings with registered land by proprietor are restrained by other parties claiming rights therein either by registering (i) *Notices*, *e.g.* A. holding lease from registered proprietor for life of twenty-one years may have "notice of such lease registered" as evidence to future purchasers from the registered proprietor; (ii) *Cautions*, *e.g.* B. having a *lis pendens* may obtain registration thereof and thus become entitled to "notice" of any future dealings with the registered lands; (iii) *Inhibitions*, *e.g.* C. on satisfying Registrar or Court that he has a justifiable claim against the registered land may obtain order "prohibiting" any dealings until the date of the order, this order, therefore, operating as an injunction; (iv) *Restrictions*, registered proprietor himself may prevent any dealings with registered lands by placing a "restriction" on any transfers, &c., of the same.

Lands registered in the Land Registry under L. T. A., 1875 and 1897, do not need registration in Yorkshire under Yorkshire Registries Act, 1884, or Middlesex under Middlesex Registry Act, 1708. In the compulsory area of registration, viz. the County and City of London, the Middlesex Registry is becoming practically merged.

A deed being still necessary or desirable in all conveyances respecting land, we will consider

a deed as to, First, its **REQUISITES**, and, Secondly, its **PARTS**.

First, **REQUISITES.** A deed is defined as "**a writing sealed and delivered.**" *Sealing* is essential, though the seal is generally reduced to a red wafer; a mere circle with L. S. in it, *i.e.* "*Locus sigilli*," has been held insufficient. *Delivery* is regularly made by touching the seal while saying, "I deliver this as my act and deed," but is effectual without words or actual handing over to other party. It takes effect from date of delivery, or if delivered to third person as *escrow*, from fulfilment of condition (*e.g.* payment of stipulated sum). **Signature,** though prudent, and therefore universal, is probably not generally necessary, as St. of Frauds seems not to affect deeds. **Attestation** is usual, but not necessary, except in conveyance under (i) *Mortmain Act*, and (ii) in deeds of *appointment under power*, when intended to conform to L. P. A. A., or (iii) when *power* expressly required attestation. **Stamps** are necessary if the deed is to be available as legal *evidence*, but not for validity. Unstamped deeds may be tendered in Court only on payment of stamp *duty* and *penalty* (Stamp Act, 1891). **Registration or Enrolment** is necessary in certain cases and for certain purposes (*e.g.* Register Counties, Disentailing Assurances, Gifts to Charities, Bargain and Sale of Freeholds, certain Rent-charges, &c.). Requisites then are—Sealing, Delivery (probably not Signa-

ture), for all purposes; sometimes or for some purposes, Attestation, Stamps, Registration, Enrolment.

Secondly, **PARTS.** No special form is essential, but any marked departure from the scientific arrangement of parts would in the long run be unintelligible or suspicious. The order of parts is (1) **Date**; (2) **Parties**; (3) **Recitals**; (4) **Testatum**; (5) **Operative Words**; (6) **Parcels**; (7) **Habendum**; (8) **Uses or Trusts** (if any); (9) **Provisos or Conditions** (if any); (10) **Covenants** (if any), including (in certain cases) (11) **Acknowledgment and Undertaking**; (12) **Surrender** and **Admittance** (copyholds).

(1) **Date.** Absence or error of *date* does not avoid a deed, if true date can be proved.

(2) **Parties** in Indenture must be at least two (described as "of the *one* part," and "of the *other* part") and may be more ("of the first part," second, third, &c.). Thus, parties to transfer of mortgage may be A. (mortgagee) of first, B. (mortgagor) of second, C. (transferee) of third part. Names of each party are followed by address and "addition," *e.g.* Colonel in the ——, Esquire, &c.

(3) **Recitals** are in this form:—"Whas the sd A. is seised in fee of," &c. Such recitals are merely "Introductory." "Narrative" Recitals describe particular instruments or events. They are not essential to validity of deed, but are often most desirable, because (1) they give a succinct

history of the property since the last purchase for value making deed suitable in future, as "Root of Title"; (2) by V. P. A., 1874, after twenty years they become presumptive evidence of facts stated; (3) they may explain or control ambiguous operative words; (4) within certain limits they estop parties to deed and those claiming under them. As to (3), they govern only where operative words are ambiguous, being governed by latter if these are clearer or are inconsistent with recitals.

(4) **Testatum** may be said to include all that follows introduced by the words "Now this Indenture Witnesseth" (always written with capitals) or (if no recitals) "Witnesseth" only. If two or more collateral acts are effected by same deed, there is more than one Testatum.

(5) **Operative Words** show nature and effect of deed; *e.g.* grant or convey in sale or mortgage-deed of freeholds, assign in transfer of lease, demise in lease itself, &c.

(6) **Parcels** or description of items of property conveyed frequently begin "All that," *e.g.* "land in Parish of ——, known as ——," &c., or "land described in schedule hereunto and coloured pink in plan annexed." Difficulties of fact rather than of Law often arise in exact description of parcels. "General words," including appurtenances and reputed appurtenances, and "Estate Clause," expressing transfer of every interest or right of conveying party

(formerly employed), are usually now sufficiently implied by C. A. Sections 1 to 6 are termed "Premises" as distinguished from habendum.

(7) **Habendum** shows the estate or interest of grantee and whether or not he holds to his own use: *e.g.* "To Hold unto and to the use of said B. in fee simple" (or "of said B. and his heirs"); or in assignment of lease, "To Hold unto said B., his executors, administrators, and assigns."

(8) The word **Use** we saw * is now employed where *cestui que use* is intended to take legal estate under the statute, *e.g.* in Springing or Shifting Uses; **Trust** where he is not, but is to be a *c. q. t.*, or where Active trusts are imposed on a trustee.

(9) **Provisos** are exemplified by proviso for redemption and reconveyance in mortgage, extending or limiting mortgagee's statutory power of sale, special powers given to trustees, or to tenant for life, &c. **Conditions** effect a similar object.

(10) **Covenants** have already been often referred to and illustrated. Certain ordinary "covenants of title" may under C. A. be implied. I. In conveyance on sale, the words "as beneficial owner" inserted in operative words (*e.g.* "the said A. B. as beneficial owner conveys," &c.) imply (*a*) *Right* to convey; (*b*) *Quiet enjoyment;*

* *v.* p. 98.

(*c*) *Freedom from incumbrances;* (*d*) *Further assurance.* These covenants are "qualified," *i.e.* they merely warrant that since last purchase for value nothing has been done by vendor, his ancestors, or testators to worsen the title he or they received. II. On ASSIGNMENT OF LEASEHOLDS, by use of same words same four covenants are implied; and (*e*) that lease is valid and subsisting, rent paid, and covenants performed (similarly qualified). III. In MORTGAGE-DEED, by same words same four covenants are implied, but here for greater security of mortgagee they are "absolute," *i.e.* they amount to warranty against any act of any person having rendered title imperfect. And similar absolute covenant is further implied in mortgage of leaseholds that lease is valid, &c., and that mortgagor will pay rent and perform covenants. IV. In A SETTLEMENT, a person expressed to convey "as settlor" merely implies a covenant for himself and his successors in title for "Further Assurance," *i.e.* that he or they will, if present conveyance be insufficient, execute any further conveyance or do anything reasonably required. V. In ANY CONVEYANCE, trustee, mortgagee, personal representative, or committee of lunatic, expressed to convey as such, merely implies a covenant against having "incumbered" the title, *i.e.* by creating any fresh charge on the land. On sale of registered land on open contract, no covenants can be required in case of absolute title; and where it is

possessory or qualified, only as to other estates in same land.

(11) **Acknowledgment and Undertaking** occur only when vendor cannot deliver title-deeds to purchaser, *e.g.* if they refer to a whole property of which he is selling part; the deed then contains acknowledgment of purchaser's right to inspect and copy, and undertaking for safe custody of them. By C. A., the liability of both is thrown on every possessor for time being, and the benefit on the person to whom they are given, and any one (other than lessee at rent) claiming estate or interest through him. *Semble*, trustees selling cannot be compelled to give such undertaking, though they may reasonably give acknowledgment.

(12) **Surrender and Admittance.** Conveyance of *Copyholds*, as we have seen, is by Surrender and Admittance. But this is often (especially on sale of property comprising both freeholds and copyholds) preceded by "covenant to surrender" contained in a deed, which (when so preceding) is a "conveyance" within C. A., so that the usual covenants of title may be implied in the prescribed manner.

The usual steps taken on sale are:—**Contract** of sale signed to satisfy St. of Frauds, sec. 4. If sale is by auction, "conditions of sale" will have preceded. Vendor's solicitor forwards "**Abstract**

of Title" to purchaser's solicitor. **Requisitions** by purchaser, and **Answers** by vendor. **Searches** for incumbrances, etc. Purchaser's solicitor sends **Draft Conveyance** to vendor's solicitor. **Engrossment** on parchment, and **Execution.**

Among usual conditions of **Contract of Sale** may be noticed: (1) Sum to be *deposited* by purchaser, and *date* for "completion of contract" by execution of conveyance. (2) "Root of *title*," *i.e.* conveyance from which proposed title is to start and be traced onwards. In absence of express provision (*i.e.* on "open contract"), purchaser has by V. P. A. right to forty years' "marketable" (not merely "good holding") title on sale of land, but on sale of *tithes* the *Crown grant* must be shown in addition, and on sale of *advowson* the period is 100 years. On open contract (i) to assign lease or sub-*lease*, by V. P. A. and C. A., lessee or sub-lessee cannot be made to produce title of *freeholder* or superior lessee; (ii) to sell *enfranchised* copyholds, purchaser cannot require evidence of title of lord of manor to *enfranchise;* and (iii) *generally*, no purchaser can call for abstract of *instruments*, or evidence of truth of *recitals* therein, of earlier date than the "root of title." The root of title should (if possible) be some conveyance for *value;* if not, it should be exactly described, or the condition is *misleading* (*Marsh* v. *Earl Granville*). "Misleading conditions" are a ground for rescinding contract; so also were "depreciatory

conditions" on sale by *trustees*, but now by T. A. these do not affect *bonâ fide* purchasers. (3) Time limited for *requisitions;* often with proviso that, if vendor is unable or unwilling to comply with them, he may rescind contract, returning deposit. (4) Sale not to be annulled by *error* or *omission* as to parcels, but *compensation* to be made.

"**Abstract of Title**" is abbreviated summary of *instruments* dealing with property from date of root of title, showing *rights* and *liabilities* attaching to the land; it is made at *vendor's* expense. On sale of registered land, purchaser on open contract is entitled only to (i) land certificate, (ii) statutory declarations (if requisite), and (iii) evidence whether any incumbrances are still subsisting or discharged.

"**Requisitions**" are questions on points in abstract suggesting *defects* in title or *liabilities* suggested by abstract, or other points discovered by Searches. Chief points to be *searched* for are:—(i) disentailing assurances; (ii) conveyances of married women; (iii) Crown and judgment debts; (iv) rent-charges (not by marriage settlement or will) since Act of 1855; (v) adjudications in bankruptcy; (vi) *lites pendentes;* (vii) registration in "Register Counties." Questions often arise whether every payment of Death Duties has been duly made, Succession and Estate Duty forming a charge on land, as against purchaser or mortgagee, barred after *six years* from notice or part payment to Commissioners of

Inland Revenue, or *twelve* years from succession itself (Finance Act, 1894, Customs and Inland Revenue Act, 1889): they may also be remitted after *twenty* years from death, in favour of beneficiaries, &c. But purchaser of *absolute* title is protected against all such charges not actually on the register. Questions as to requisitions, title, &c., not affecting validity of contract itself, may be settled on "Vendor and Purchaser Summons," under V. P. A., sec. 9. The whole course of proceedings to insure that purchaser does not "buy a lawsuit instead of an estate," or an estate clogged with unforeseen liabilities, is apt to be expensive, the cost falling partly on both sides: in particular (by C. A.) costs of inspection of documents not in *vendor's possession* and of *searches, stamped or office copies, &c.*, fall on *purchaser*. On open contract (1) to *lease*, or (2) to *mortgage*, *lessee* or *mortgagor* pays costs of both solicitors, if each party employs different solicitor. Conditions of sale sometimes, requisitions and answers thereto, and conveyance itself much oftener, are settled or drafted by counsel. It is not yet possible to forecast the exact effects of compulsory registration of title under L. T. A. throughout England generally by reason of the limited area of its present operation: therefore the old system of conveyancing must still hold good over the greater part of the country for a longer or shorter time to come.

TABLE M.

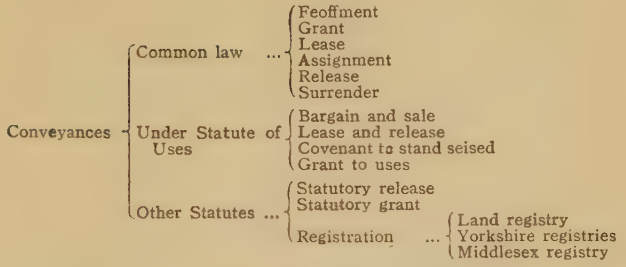
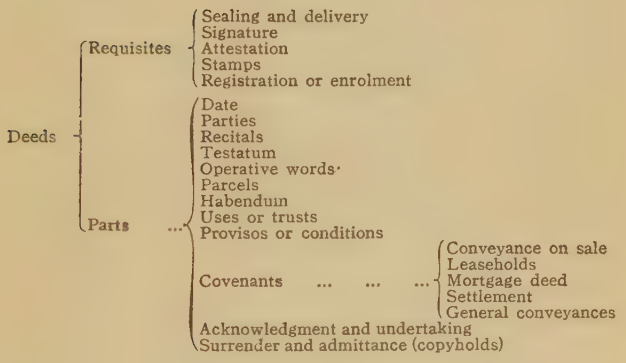


TABLE N.



CHAPTER XIV.

CONVEYANCING.

CONVEYANCING is an art, and cannot be taught by books alone. But some general remarks and analysis of specimens may be of assistance both towards understanding and framing actual deeds.

To begin with **PURCHASE-DEEDS.** If the title is clear and free from complication, and the deed is not intended as a future root of title or to "make evidence" (v. *Wallis & Grout's Contract*), recitals may be omitted, and it might run thus:—

This Indre made the ——— day of ———, 19—, Btwn A. B. of ——— in the Cy of ———, Esq., of the one part, and C. D. of ——— in the Cy of ——, Gentn, of the other part, WITNESSETH that in conson of £——— by sd C. D. to sd A. B. pd (the recet whof the sd A. B. hby acknowledges), the sd A. B. as beneficial owner grants to the sd C. D. ALL THAT (land or houses described, or described in schedule and delineated in plan): To HOLD TO AND TO THE USE of the sd C. D. in fee simple: IN WITNESS whof the sd pties have hrunto set their

hands and seals respy on the sd day in the sd year above written.

[Schedule, with plan.]

Signed, sealed, and delivered by A. B. (L.S.)
the above-named A. B. and
C. D. in the presence of E. F.
of ———. C. D. (L.S.)

Very few cases would admit of such brevity. But the main framework in any deed, long or short, is found in the same heads and same order: viz., **Parties, Recitals, Testatum** and **Operative Words, Parcels, Habendum, Uses** and **Covenants** (if any). Thus, the above form might be enlarged by, *e.g.* two "introductory" Recitals. (1) that "A. B. is *seised in fee*," &c.; (2) that "sd A. B. *has agreed to sell the sd premes* to C. D. for £——," and by any express Covenants differing from or additional to those implied by C. A.

On purchase of **LEASEHOLDS,** the parties will be (1) **Assignor,** and (2) **Assignee;** the main Recitals (i) *Grant of Lease,* (ii) *Previous assignments* (if any), (iii) *Agreement to assign;* in Operative Words, A. "as beneficial owner" will assign to sd B., his exs, ads, and assigns (parcels) "To Hold the same Unto sd B., exs, &c., for resue unexd of sd term"; and there will be express Covenant by B. to indemnify A. for any future non-payment of rent or breach of covenants during residue of term.

On purchase of **COPYHOLDS,** the deed preceding Surrender will contain *Recital* of title of copyholder; in this, though true seisin is in lord, it is usual to say that vendor is "seised of a descendible estate to him and his heirs to be holden at the will of the lord," &c.: in *Operative Words,* A. "as beneficial owner doth covenant with sd B., his hrs and assigns, that sd A. at cost of B. will surrender to lord of manor of ——, according to custom of sd manor (parcels) to use of sd B. his hrs and assigns to be Holden of lord of sd manor by copy of Crt Roll accordg to custom of sd manor": and there will be a *Declaration of Trust* for B. till such surrender.

The variations in these two cases show (1) the *personal* character of Leasehold, B.'s name being followed by "executors," &c.: and (2) the peculiarities of Copyhold tenure as parcel of a *manor.*

If vendor under specifically enforcible contract of sale die before completion, his personal representative has power under L. T. A. to convey to the purchaser. On sale by tenant for life under powers of S. L. A., conveyance will show (*a*) that purchaser pays to trustees or into Court by direction of vendor (*b*) habendum discharged from settlement, and (*c*) may state that covenants implied under C. A. are specially limited to acts or default of vendor and his privies.

MORTGAGE-DEEDS closely resemble purchase-deeds, the essential difference being

addition of **Proviso for Redemption.** A skeleton mortgage follows, comprising freeholds, copyholds, and leaseholds, mortgagees being three trustees under a settlement authorizing investment of trust-funds on leasehold security. The trust does not appear on face of deed, so as not to affect other persons with notice of trust. By C. A. expression of *joint account* suffices to make money remain on joint account and receipt of survivors or survivor to be *complete discharge* to payer.

Date and *Parties* (A. *mgor* of one pt. B., C., D., *mgees* of other). *Recitals* (1. Title to Freeholds; 2. Admission to Copyholds; 3. Lease; [4. Assignments, if A. is not original lessee]; 5. Agreement to lend £——— out of moneys on jt account on sd security). 1st *Testatum* (conson and rect). *Operative Words* (sd A. as beneficial owner doth grant to sd B., C., and D. in fee simple). *Freehold Parcels. Habendum* (To HOLD in fee simple subject to proviso for redemption hinafter conted.) 2nd *Testatum* (afsd conson). *Operative Words* (sd A. as benef. owner hby covenants to surrer to lord of manor of ——— accg to custom throf). *Copyhold Parcels.* To USE of sd B., C., and D. to be holden of lord of sd manor by copy, &c., subject to services, &c. SUBJECT TO CONDON for makg void the same corresponding to proviso for redemption hinafter conted. *Declaration* of trust for B., C., and D. till surrer. 3rd *Testatum* (afsd conson). *Operative Words* (sd A. as benef owner demises to sd B., C., and D. thr exs, &c.). *Leasehold Parcels.* To HOLD to them thr exors, &c., for resue of sd term of ——— yrs except last day throf

subject to proviso for redemption hinafter conted. *Declaration* of trust of last day by mgor for mgees. *Proviso* for redemption (PROVIDED ALWAYS that if sd A. his hrs, exs, &c. shall on sd day of ——— next pay to sd B., C., and D. thr exs, &c. said sum of £——— with intt as afsd, sd B., C., and D., thr exs, &c. shall on request and at cost of sd A., his hrs, exs, &c. reconvey and surrer or assign sd freeholds and leaseholds respy to use of sd A. his hrs and assigns or as he or they shall direct). *Covenant* to pay intt (AND sd A. doth hby for himself, his hrs, exs, &c. covenant with sd B., C., D., thr exs, &c., that he the sd A., his hrs, &c., or assigns will on ——— day of——— next, pay to sd B., C., and D., thr exs, the sum of £——— (principal) with intt for same at rate afsd, if not so pd will pay intt thron at rate afsd on ——— day of ———, and ——— day of ——— in every year until principal repd: PROVIDED ALWAYS that if half-yr's intt at rate of (*e.g.* 4½ per cent.) be pd on apped day or within ——— thrafter, the sd B., C., and D., &c., shall accept the same satisfon for the intt at rate of (*e.g.* 5 per cent.) payable under covenant hinbefore immediately conted) [Express powers of sale, leasing, &c., if differing from implied powers under C. A. Agreement for consolidation]. IN WITNESS, &c.

The mortgage of Leaseholds here is by **sub-demise.** The covenants of title, implied under C. A., are *absolute*. A deed of **TRANSFER OF MORTGAGE** may be sketched as follows; the mortgagor being a party to testify to the state of accounts between him and mortgagee.

Date and *Parties* (A. *mgee* of 1st pt, B. *mgor* of 2nd, C. *transferee* of 3rd). *Recitals* (1. Mge. 2.

Debt still owing, but intt pd. 3. Agreement for transfer). 1st *Testatum* (conson pd by C., recet by A.). *Operative Words* (sd A. as mgee at request of sd B., doth hby Assign unto C., his exors, &c. ALL THAT, the sd principal sum of £———, owing to sd A. on security afsd, And all intt to become due thron, AND benefit of all powers, remedies and securities for securing or recovering sd principal sum and intt: TO HOLD the same UNTO sd C., his exs, &c., absolutely). 2nd *Testatum* (afsd conson). *Operative Words* (sd A. as mgee, at request of sd B., doth Grant and sd B. Grants and Confirms unto said C. ALL AND SINGULAR the hrds and premes granted by the hinbefore recited indre of mge); To HOLD the same UNTO AND TO THE USE of the sd C. in fee simple, SUBJECT to the said eqy of redemption, on payment, &c. IN WITNESS, &c.

If mortgagor has "*incumbered*," *i.e.* mortgaged equity of redemption, there is (i) **fresh personal covenant for repayment,** and (ii) **reference in habendum to original proviso for redemption.** For copyholds, where there has been surrender under mortgage, there will be **new surrender to use of transferee.**

In illustrating **RECONVEYANCE,** we will suppose the mortgage to have been *transferred*, and the transferee to have died intestate; also that the mortgagor has sold the *equity of redemption* (in popular language, sold the land subject to the mortgage) and the purchaser has died after devising it. The **RECONVEYANCE** will then assume this form:—

Date and *Parties* (A. *admor.* of transferee of the one pt, B. *devisee* of the other). *Recitals* (1. Mge. 2. Transfer. 3. Dth of transferee and grant of Letters of Admon to A. 4. Sale of eqy of redemption. 5. Purchaser's Will. 6. Dth of purchaser and vesting of eqy of redemption in B. 7. Agreement for repaymt and reconveyance). *Testatum* (paymt of principal and intt, and recet). *Operative Words* (sd A., as ponal reprive of ———, doth Grant and Release unto sd B., his hrs and Assigns, ALL AND SINGULAR the hrds, &c.): To HOLD the same UNTO AND TO THE USE of the sd B., his hrs and assigns discharged from the sd sum of £———, and intt thron, and from all clms and demands under the sd mge or otherwise. IN WITNESS, &c.

In the above transfer, the words "said A. as *mortgagee*," and in the Reconveyance the words "said A. as *personal representative*," &c., under C. A. imply covenant against incumbrances. Where there has been surrender of copyholds, A. will warrant to enter up on Court roll satisfaction of mortgage debt.

LEASES vary greatly. An **outline lease of house and land** attached to it may be given:—

Date and *Parties* (A. *lessor* of the one pt, B. *lessee* of the other). *Testatum* (conson of rents and covts). *Operative Words* (sd A. Demises to sd B., his exs, ads, and assigns, ALL THAT messuage and tenmt known as No. —— in ——— Street, &c., togr with the yard, garden, and outbuildings thto belongg, and the field or close on the N. side throf, known as ———, conting in length ———, and in brdth ———, or thrabouts, TOGR with right

in common with lessor and adjoing tenants or occupiers to the use of the roadway on the E. side known as ——— Lane, leading from ——— to ———; lessee contributg from time to time a due proportion of expenses of maintaing sd roadway): To HOLD to sd B., his exs, &c., from ——— next for 21 years, PAYG therefor yrly durg sd term the rent of £———, by four quarterly paymts on the four usual quarter days in every yr, the 1st paymt to be made on the ——— day of ——— next. AND the Lessee doth hby, for himself and his assigns, covt with the Lessor in mner followg, that is to say:—Covt for paymt of rent [and taxes] [painting and repair] [agst assigng, or underlettg witht written leave]. Proviso for re-entry by B. on non-paymt of rent or breach of covts: AND the Lessor doth hby, for himself and his assigns, covt with the Lessee—Covt for quiet enjoymt [Insurance] [Power to (lessor, or) lessee to determine lease at end of first seven or fourteen yrs]. IN WITNESS, &c.

The proviso for **re-entry** will, as regards non-payment of rent, be expressed to take effect, "whether any formal or legal demand thereof shall have been made or not," but of course is subject to the rules as to relief under C. L. P. A. and C. A. The whole of the lessee's covenants here named "**run with the land.**" There is no need for recitals. It may be noticed that on open *contract* to grant lease or sub-lease, intending lessee or sub-lessee cannot call for *freeholder's* title (V. P. A.), and on open contract to sell a sub-lease the purchaser cannot call for title to leasehold reversion (C. A.).

For **UNDER-LEASE,** there will be recital of **head-lease,** and **covenants by sub-lessee,** corresponding to lessee's covenants in head-lease, and **lessee will covenant to pay head-rent,** and do nothing to **cause forfeiture.**

SETTLEMENTS of land may be *Personal* or *Real.* The former are made by way of **Trust for Sale,** producing "notional" conversion of the land into money, exactly as in the form of will given in Chapter XII. To take a comparatively simple case: Suppose a man about to marry has a little *land* which he wishes to settle, reserving his personalty, while the lady has *personalty* only, also to be brought into settlement, the general outline will be as follows:—

Date and *Parties* (A. *intending husband* of the 1st pt, B. *intending wife* of the 2nd, C., D., E., hinafter called "the *trees*" of the 3rd). *Recitals* (1. Intended marriage. 2. Title of A. to freeholds. 3. Transfer [or intended transfer] of B.'s ponalty to sd trees. 4. Agreemt to settle). 1st *Testatum* (in pursuance of sd agreemt and conson of sd mrrge). *Operative words* (sd A. as settlor with approbation of sd B., Doth hby Grant unto sd trees and their heirs ALL THAT, &c., TO HOLD the sd hrds and premes TO THE USE of sd A. and hrs till sd mrrge, and after the sd mrrge TO THE USE of the sd trees thr hrs and assigns, Upon the Trusts hinafter declared). 2nd *Testatum* (same agreemt and conson). AND it is hby Agreed and Declared that sd trees shall after sd mrrge stand possessed of sd (ponalty of B. transferred to them), UPON TRUST that they shall at request in writg of sd A.

& B., or the survor, and after dth of survor, at discretion of sd trees, sell sd hrds and premes hby assured, with all powers in that behalf of absolute owner. *Powers* of Leasing and Interim Managmt till sale. *Declaration* of Trust out of sale-moneys and till sale to pay A. income derived from, or rent and profits of freeholds, and to B. income derived from her ponalty, after dth of A. or B. to pay both to survor, after dth of survor In Trust for children attaing 21, or drs marrying thrunder, as apped by A. or B. jointly by deed, or by survor by deed or will, in dflt of appmt equally. [*Hotchpot* and *Advancemt* clauses.] In dflt of issue, *Ultimate Trust* as to sale-moneys of freeholds In Trust for next-of-kin of A. under Sts of Distribution, but subjt to any appmt by A. by deed or will; as to ponalty similarly in favour of B., her appointees, or next-of-kin. [Agreemt for settlemt of after-acquired ppy of B. amounting to more than £—— at any one time.] *Nomination* of pon (*e.g.* A. and B., or survor) to appt new trees under C. A. *Proviso* avoidg settlement if no marriage within 12 months. IN WITNESS, &c.

It will be seen that legal estate in the freeholds continues by way of *resulting use* in A. till the marriage, when it passes to the trustees; the subsequent trusts, being active uses, are not executed by the Statute. The latter part of the Settlement (except as to freeholds) is similar to the will outlined in Chapter XII.

"REAL" SETTLEMENTS are mostly by way of **"strict settlement,"** creating life estates in persons *in esse*, followed by **estates tail** in remainder given to unborn persons, in a regular

order of succession, together with provisions for **pin-money, jointure,** and **portions.** The estates may be either *legal* or *equitable.* In the former case the trustees take no estate, but have powers of control, management, and alienation. An example of the former settling freeholds and leaseholds may be thus sketched:—

Date and *Parties* (A. *husband* of 1st pt, B. *intending wife* of 2nd, C. and D. *trees* of 3rd). *Recitals* (1. Intended mrrge. 2. Title to Freeholds. 3. Title to Leaseholds. 4. Agreement for settlement). 1st *Testatum* (in pursuance of agreemt and conson of mrrge), sd A. as settlor, with approbation of sd B., Doth hby Grant unto sd C. and D. in fee simple, ALL THAT (more partarly described in Schedule hto), TO HOLD the same Unto sd C. and D., and thr hrs, To THE USE of sd A. in fee simple until sd mrrge, and thrafter To THE USES followg (that is to say): To THE USE that the sd B. and her assigns shall durg jt lives of sd A. and B. receive yrly rent-charge of £———, and after dth of sd A., shd sd B. survive him, yrly rent-charge of ——— as jointure, and in lieu of all dower, the same issuing out of hrds hby settled and payable (quarterly, or half-yrly, &c.): AND subjt and charged as afsd To THE USE of sd A. and his assigns durg his life [witht impeachmt of waste], And from and after his dth To THE USE of sd C. and D., thr exs, &c., for the term of 1000 yrs, to commence from dth of sd A. witht impeachmt of waste, Upon Trusts and subject to Powers and provons hinafter decld concerng the same. And from and after determon of sd term, and meanwhile subjt thrto and to trusts throf, To THE USE of 1st and every other son of sd A. successively in remer, accg to

seniority in tail male, with remer in dfit of such issue, To THE USE of sd A. in fee simple. AND IT IS HBY AGRD AND DECLD that sd premes are hrby limed to sd C. and D., thr exs, &c., for sd term of 1000 yrs, Upon Trust that if there shall be younger child or children who shall attain 21, or being dr or drs marry thrunder, other than any son who before 21 shall become entitled in posson or remer under these presents to sd hrds hby settled for 1st este in tail male, then sd C. and D., &c., shall after dth of sd A., raise by mge or sale of sd premes or of pt or sd term, or out of rents and profits throf, or by sale of timber or minerals, or by any of means afsd, the sum of £———, and hold the same in trust for all or such one exclusively on such condons and manner as sd A. [or sd A. and B. jointly, or survor] shall by deed or will appt. AND IN DEFAULT of, and subjt to such appmt, in Trust for such children or child, and if more than one, equally as tenants in common [*Hotchpot* and *Advancement* Clauses. *Power* to *jointure* any future wife and *portion* her children. *Extension* of powers under S. L. A., and of powers of *management* by trees durg minority of eldest survg son]. 2nd *Testatum*, &c., sd A., as settlor, Both Assign unto sd C. and D., thr exs, &c., ALL AND SINGULAR the lands and tenmts demised by Indres of Lease described in Schedule hto, To HOLD the same unto sd C. and D. thr exs, &c., for resue unexped of respive terms, subjt to rents and covts, &c., UPON TRUST for sd A. till mrrge, and afterwards UPON TRUST that sd C. and D. shall, out of rents and profits throf, pay rents and pform covts, and subjt thrto hold same upon such trusts and subjt to such powers and provons as shall correspond, as nrly as thr nature pmits, with those hinbefore decld concerng freeholds hby settled, but so that sd leasehold premes shall not

vest absoly in any pon hby made tenant in tail male by pchase, unless he attains 21, but on his dth thrunder shall devolve as if pt of freeholds of inheritance hby settled. *Agreemt* that C. and D. be trees of these presents for pposes of S. L. A. *Proviso* avoidg Settlemt if no mrrge within 12 months. IN WITNESS, &c.

Sufficient of the language in shortened form is here set out to show the general drift of the settlement. As to **freeholds**, it is seen to be a Grant to Uses operating under the St. of Uses, and (i) vesting by way of *Resulting Use* the fee in A. till marriage, and afterwards by way of *Springing Uses;* (ii) a *Rent-charge* in B. for pin-money during coverture; (iii) an increased Rent-charge for *Jointure* for her life after A.'s death; (iv) a *life estate* in A.; (v) a *Long Term* vested in C. and D. as security for portions, and preceding the inheritance; (vi) *Remainders in tail* male to the first and other sons of A. and B. in order of seniority; and (vii) *Ultimate Remainder* in fee to A. The rest is subsidiary matter for working out these limitations in detail. *Pin-money* and *Jointure* were, before 1883 (and still may be), secured by another long term (*e.g.* of 99 years), vested in the same or different trustees. But this is now needless, as by M. W. P. A. the wife can take the *legal* estate in a rent-charge. As to *leaseholds*, this part of the settlement is a C. L. deed of assignment, the assignees taking the property on trust. If no fresh settle-

ment is executed, it will, so to speak, wear itself out within due time. Suppose A. and B. have a son E., he is tenant in tail by purchase under the settlement,* and on his attaining 21, the leaseholds vest absolutely in him, in remainder if A. is living, in possession if A. is not.

If E. attains 21 in A.'s lifetime, he and A. will very probably decide to **re-settle,** making E. tenant for life in remainder after A., and E.'s hypothetically future sons tenants in tail. For which purpose E. will first of all disentail with concurrence of A. The **DISENTAILING ASSURANCE** will run thus:—

Date and *Parties* (E., *tenant in tail,* of the 1st pt, A., *protector,* of the 2nd, F., *grantee to uses,* of the 3rd). *Recitals* (previous settlemt, and any subsequent dealings with ppy. Desire of E. and A. to bar este tail and subseqt estes. *Testatum* (in pursuance of such desire and conson of premes) sd E. with consent of sd A. hby testified Doth by this deed intended to be enrolled in C. O. pursuant to St, Grant unto sd F. in fee simple ALL AND SINGULAR lands, &c., comprised in sd Indre of Settlemt, or of wh sd E. is now by any means tenant in tail male at law or in eqy by virtue of sd Indre of Settlemt, To HOLD the same UNTO sd F., SUBJT to (all uses, estes, incumbrances, if any, recited, and powers annexed thrto, precedg este tail), BUT FREED and Discharged from all estes in tail and all remers, estes, and powers thrafter. To SUCH USES, Trusts, Powers, and Provons as sd

* *v.* p. 45.

E. and A. shall hrafter by deed with or witht power of revocon and new appmt jtly direct or appt. And in Delt of and subjt to such appmt, To the Uses, Trusts, Powers, and Provons wh under sd Indre of Settlemt are subsistg or capable of takg efft, and so as to restore and confirm the same. In witness, &c.

INDENTURES *inter partes* are far commoner than **DEEDS POLL** made by one party only. We conclude with a specimen of the latter, being an **APPOINTMENT** by A. under power in above Settlement to a younger child, G.

To All to Whom these Presents shall come, A., of ———, sends greeting. Whas by an Indre, &c. (recitg so much as concerns the power of appt). And Whas there have been issue of sd mrrge ——— children, &c. And Whas G., one of such younger children (*e.g.* has attained twenty-one, or is about to be married, &c.) and sd A. is therefore desirous of apptg pt of sd sum of £——— in favour of sd G. in manner hinafter appearg. Now these Presents Witness, that in psuance of such desire sd A. Doth hby, in exercise of sd power and of every or any other power in this behalf him enablg, irrevocably appt that (if sd mrrge take place within ——— months, &c.,) the sum of £——— part of sd sum raisable as afsd shall immediately be vested in sd G., and payable to sd G., exs, &c., upon dth of sd A. with intt at rate of £——— p.c.p.a. from his dth till payment throf. In Witness, &c.

The above is an **irrevocable Appointment.** But such a deed under some circumstances might

witness to *partial revocation* of previous appointment, and secondly to *new appointment*, with proviso that it shall be lawful hereafter by deed to revoke wholly or partially the present appointment, and to declare new uses or trusts within the limits of the original power.

CASES.

PAGE

Adams *v.* Angell (redemption of mortgages), 5 Ch. D. 64 147
Alexander *v.* Alexander (excessive appointment), T. C. 555 105
Allen, In the goods of (attestation of will), [1893] P. 184 164
Angus *v.* Dalton (lateral support), 6 App. Cas. 740 ... 118
Ashforth, *re* (contingent remainders), [1905] 1 Ch. 535 ... 87
Austerberry *v.* Oldham Corporation (restrictive covenants), 29 Ch. D. 750 129

Baker *v.* Sebright (equitable waste), 13 Ch. D. 179 ... 31
Bellamy, *re* (trustee's receipt), 25 Ch. D. 620 175
Bennet, *re* (tenant for life), [1903] 2 Ch. 136 37
Biggs *v.* Hoddinott (clog on redemption), [1898] 2 Ch. 307 139
Boehm, In the goods of (latent ambiguity), [1891] P. 247 168
Bourne *v.* Keane (bequest for masses) [1919] W. N. 182 54
Brace *v.* Marlborough (tacking), 2 P. Wms. 491 146
Bridger, *re* (devise to charities), [1894] 1 Ch. 297 ... 52
Brooke and Fremlin's Contract, *re* (married woman's reconveyance), [1898] 1 Ch. 647 166
Buckley *v.* Howell, 29 Bea. 552 105

Cadell *v.* Palmer (perpetuity), T. C. 578 54
Carter and Kenderdine's Contract, *re* (voluntary assurances), [1887] 1 Ch. 776 53
Cartwright, *re* (permissive waste), 41 Ch. D. 532 ... 30, 127
Catherine Salt, *re* (lunatic tenant for life), [1896] 1 Ch. 117 37
Cattell, *re* (accumulation), [1914] 1 Ch. 177 57
Chastey *v.* Ackland (access of air), 13 T. L. R. 237 ... 118
Chenoweth, *re* (gavelkind), [1902] 2 Ch. 488. 14
Clarke's Settlement, *re* (improvements), [1902] 2 Ch. 327 33
—— —— —— (gift to child of unborn person), [1916] 1 Ch. 467 87
Clay and Tetley, *re* (administrator's power of sale), 16 Ch. D. 3 174

PAGE
Coleridge's Settlement, *re* (tenant for life), [1895] 2 Ch. 704 33
Collins *v.* Elstone (revocation), [1893] P. 1 166
Cooper *v.* Belsey (tenant for life), [1899] 1 Ch. 639 ... 31
——— *v.* France (grand nephews), 19 L. J. Ch. 313 ... 71
Cummins *v.* Fletcher (consolidation), 14 Ch. D. 699 ... 147

D'Angibau, *re* (collateral powers), 15 Ch. D. 228 102
Dashwood *v.* Magniac (cutting timber), [1891] 3 Ch. 306 30
Davison's Settlement, *re* (words of purchase) [1913] 2 Ch. 498 90
Doe *v.* Bell (yearly tenancy), 2 S. L. C. 116 126
Dowse *v.* Gorton (executors trading), [1891] A. C. 190 ... 173
Dumpor's Case (waiver), 1 S. L. C. 32 130

Eager *v.* Furnivall (lapse), 17 Ch. D. 115 169
Edwards *v.* Carter (infant's conveyance). [1893] A. C. 360 59
Elwes *v.* Maw (fixtures) 6 R. R. 523 5
Ethel's Contract, *re* (conveyance in "fee"), [1901] 1 Ch. 945 ... ... 38, 47
Eyre *v.* Eyre (release of powers), [1901] P. 131 104

Fear *v.* Morgan (easements), [1906] 2 Ch. 406 160
Fearnside *v.* Flint (collateral bond), 22 Ch. D. 579 ... 156
Fitzgerald's Trustee *v.* Mellersh, [1892] 1 Ch. 385 ... 151
Fitzroy *v.* Harris (defective exercise of power), [1891] W. N. 76 107
Freeman *v.* Pope (defeating creditors), 5 Ch. 538 53
Frisby, *re* (collateral bond), 43 Ch. D. 106 156
Frost, *re* (double possibilities), 43 Ch. D. 217 87

Gaskell and Walter's Contract, *re* (convict's conveyance), [1906] 1 Ch. 440 60
Gerard's Settled Estates, *re* (improvements), [1893] 3 Ch. 252 33
Grant *v.* Ellis (limitation of action), 11 L. J. Ex. 228 ... 157
Gray *v.* Bonsall (relief against forfeiture), [1904] 1 K. B. 132
—— *v.* Siggers (wasting property), 15 Ch. D. 74 172
Greenwood, *re* (estate on condition), [1903] 1 Ch. 749 ... 24

PAGE
Harding *v.* Glyn (precatory trusts), 2 W. & T. 335 ... 103
Harkness and Allsopp's Contract, *re* (married woman's conveyance), [1896] 2 Ch. 358 166
Harlock *v.* Ashberry (acknowledgment), 19 Ch. D. 539 ... 156
Harter *v.* Colman (consolidation), 19 Ch. D. 630 ... 148
Haywood *v.* Brunswick Building Society (restrictive covenants), 8 Q. B. D. 403 ... ... 48, 129
Heath *v.* Pugh (foreclosure), 7 App. Cas. 235 156
Henty *v.* Wrey (fraudulent appointment), 21 Ch. D. 332 105
Hewson *v.* Shelley (administrator selling land), [1914] 2 Ch. 13 175
Hodson and Howe's Contract, *re* (sale by equitable mortgagee), 35 Ch. D. 668 151
Hope *v.* Hope (curtsey), [1892] 2 Ch. 336 69
Houghton, *re* (powers of tenant for life) 30 Ch. D. 102 ... 36
Howe *v.* Dartmouth (wasting property), 1 W. & T. 68 ... 172
Howgate and Osborne's Contract, *re* (married woman bare trustee), [1902] 1 Ch. 451 166

Jennings *v.* Jordan (consolidation), 6 App. Cas. 698 ... 148
Jupp, *re* (entireties), 39 Ch. D. 148 79

Kemp *v.* Lester (bills of sale), [1896] 2 Q. B. 162 ... 143
Kennedy, *ex parte* (bill of sale), 21 Q. B. D. 384 142
Kilgour *v.* Gaddes (easements), [1904] 1 K. B. 457 ... 160
Kinsman *v.* Rouse (redemption action), 17 Ch. D. 104 ... 156
Kirkland *v.* Peatfield (collateral bond), [1903] 1 K. B. 756 156

Lawrence *v.* Lawrence (words of purchase), [1915] 1 Ch. 129 89
Leventhorpe *v.* Ashbie ("heirs of body" in personalty), T. C. 382 45
Levy, *re* (convict trustee), 17 Ch. D. 746 60
Lewis Bowles' Case (waste), 11 Rep. 75 30
London and County Banking Co. *v.* Goddard (sale by equitable mortgagee), [1897] 1 Ch. 642 151

PAGE
Macgregor *v.* Macgregor (meaning of "issue"), 21 Q. B. D. 424 168
Mann, &c., Lim. *v.* Registrar of Land Registry (interesse termini), [1918] 1 Ch. 202 125
March, *re* (entireties), 27 Ch. D. 166 79
Marsh *v.* Granville (voluntary conveyance), 24 Ch. D. 11 194
——— *v.* Lee (tacking), 1 W. & T. 68 145
Martha Baggs, *re* (lunatic tenant for life), [1894] 2 Ch. 416 *n.* 37
Maskell and Goldfinch's Contract, *re* (infant's gavelkind lands), [1895] 2 Ch. 525 ... ... 59, 180, 183
Minter *v.* Carr (consolidation), [1894] 3 Ch. 498 ... 147
Molton *v.* Camroux (lunatic's conveyance), 4 Ex. 17 ... 59
Morgan *v.* Thomas (remainder), 9 Q. B. D. 643 89

Nash, *re* (gift to child of unborn person), [1910] 1 Ch. 1 87
Natt, *re* (representation), 37 Ch. D. 517 70
Noakes *v.* Rice (clog on redemption), [1902] A. C. 24 ... 138

Occleston *v.* Fullalove (illegitimate children), 9 Ch. 147 ... 168
Oxley, *re* (executors trading), [1914] 1 Ch. 604 173

Patman *v.* Harland (constructive notice), 17 Ch. D. 353 ... 129
Penny *v.* Commissioner for Railways (vested interests), [1900] A. C. 628 92
Pepin *v.* Bruyere (will of leaseholds), [1902] 1 Ch. 24 ... 167
Phillips *v.* Cayley (general devise), 43 Ch. D. 222... ... 170
Pilling's Trusts, *re* (administrator), 54 W. R. 113 ... 70
Pledge *v.* White (consolidation), [1896] A. C. 187 ... 148
Powers, *re* (collateral bond), 30 Ch. D. 291 156
Price, *re* (will of married woman), 28 Ch. D. 709 165

Quarm *v.* Quarm (joint tenants), [1892] 1 Q. B. 186 ... 77

Ray's Settled Estates, *re* (notice to trustees), 25 Ch. D. 464 34
Reeve *v.* Long (posthumous child), 1 Salk. 228 67
Rolt *v.* Hopkinson (tacking), 9 H. L. C. 514 145
Roose *v.* Chalk (residuary estate), 49 L. J. Ch. 625 ... 72

PAGE

Roundwood Colliery Co. *re* (attornment clause), [1897] 1 Ch. 373 142
Rumney and Smith's Contract, *re* (transfer of mortgage), [1897] 2 Ch. 351 149
Russel *v.* Russel (equitable mortgage), 2 W. & T. 76 ... 150

Salt *v.* Northampton (clog on redemption), [1892] A. C. 1 138
Saunders *v.* Vautier (accumulation), 10 L. J. Ch. 354 ... 172
Shelley's Case (words of limitation), T. C. 332 88, 107
Silcocks *v.* Silcocks (words of limitation), [1916] 2 Ch. 161 90
Smith, *re* (powers of tenant for life), [1899] 1 Ch. 331 ... 36
Smith and Stott's Contract, *re* (long terms), 48 L. T. R. 512 134
Somes, *re* (release of powers), [1896] 1 Ch. 250 ... 104, 105
Spencer's Case (covenants running with land), T. C. 332 129, 130
Sugden *v.* St. Leonards (revocation), 1 P. D. 154 ... 167
Sutton *v.* Sutton (personal covenant in mortgage), 22 Ch. D. 511 156

Taltarum's Case (recoveries), T. C. 195 39
Tanqueray-Willaume and Landau, *re* (executor's power of sale), 29 Ch. D. 465 174
Taylor *v.* Meads (married woman's estate) 4 De G. J. & S. 597 61
Tollet *v.* Tollet (relief on defective execution of power), 2 W. & T. 289 102
Tyrrel's Case (use upon a use), T. C. 289 98

Valentini *v.* Canali (infant's conveyance), 24 Q. B. D. 166 59
Venn and Furze's Contract, *re* (executor's power of sale), [1894] 2 Ch. 101 174
Viner *v.* Francis (devise to a class), T. C. 417 172
Vint *v.* Padgett (consolidation), 2 De G. & J. 611 ... 147

PAGE
Wallis & Grout's Contract, *re* ("making evidence"), [1906] 2 Ch. 206 198
Walsh *v.* Lonsdale (lease not under seal), 21 Ch. D. 9 ... 127
Watson, *re* (will made abroad), 19 Ch. D. 384 167
Wenmoth's Estate, *re* (bequest to a class), 37 Ch. D. 266 172
Wernher, *re* (will of infant soldier), [1918] 2 Ch. 82 ... 102
West *v.* Ray (execution of power), Kay 385 103
Wheeldon *v.* Burrows (implied easement), 12 Ch. D. 31 ... 118
Whitby *v.* Mitchell (contingent remainders), 44 Ch. D. 85 87
Whiteley *v.* Delaney (keeping mortgage alive), [1914] A. C. 132 147
Wild's Case (devise to parents and children), T. C. 361 ... 171
Wilson *v.* Eden (general devise), 4 H. L. C. 257 170
Wimperis, *re* (restraint on anticipation), [1914] 1 Ch. 562 61
Wright's Settled Estates, *re* (rebuilding mansion), [1900] W. N. 261 33

STATUTES.

A.D.		PAGE
1225.	9 Hen. III. c. 36 (*Magna Charta*)	51, 119
1236.	20 Hen. III. c. 4 (St. of Merton)	114
1279.	7 Ed. I. c. 2 (First St. of Mortmain)	51, 95
1285.	13 Ed. I. c. 1 (*De Donis*)	25, 39, 44, 45, 85
	c. 18 (St. of Westminster the Second)	57
1290.	18 Ed. I. c. 1 (*Quia Emptores*)	16, 24, 48, 111, 119
1391.	15 Rich. II. c. 5 (Second St. of Mortmain)	50, 95
1488.	4 Hen. VII. c. 24 (St. of Fines)	39
1529.	21 Hen. VIII. c. 15 (recovery of terms)	125
1535.	27 Hen. VIII. c. 10 (St. of Uses)	49, 96-110, 120, 181, 182, 183
	c. 16 (St. of Enrolments)	182
1539.	31 Hen. VIII. c. 1 (partition)	78
1540.	32 Hen. VIII. c. 1 (St. of Wills)	13, 15, 49, 96, 162
	c. 34 (assignment of reversion)	83
1571.	13 Eliz. c. 5 (fraud on creditors)	53
1584.	27 Eliz. c. 4 (fraud on purchasers)	54
1623.	21 Jac. I. c. 16 (St. of Limitation)	158
1660.	12 Car. II. c. 24 (St. of Tenures)	13, 49
1670.	22 & 23 Car. II. c. 10 (St. of Distribution)	70
1677.	29 Car. II. c. 3 (St. of Frauds)	27, 49, 71, 124, 127, 150, 151, 162, 181, 193
1685.	1 Jac. II. c. 17 (Second St. of Distribution)	70
1692.	4 & 5 Wm. & M. c. 16 (St. of Clandestine Mortgages)	146
1698.	10 Wm. III. c. 16 (posthumous children)	67
1702.	1 Anne, c. i. (Crown lands)	11
1705.	4 & 5 Anne, c. 3 (attornment)	82
1707.	6 Anne, c. 11 (Union of Scotland)	9
	c. 72 (*C. q. v.*)	28
1708.	7 Anne, c. 20 (Middlesex Registry)	187

A.D.		PAGE
1709.	8 Anne, c. 14 (landlord and tenant)	131
1730.	4 Geo. II. c. 28 (landlord and tenant)	119, 121, 124
1736.	9 Geo. II. c. 36 (charitable trusts)	51
1737.	11 Geo. II. c. 19 (distress)	124, 131
1769.	9 Geo. III. c. 16 (Crown suits)	154
1800.	39 Geo. III. c. 67 (Union of Ireland)	9
	c. 98 (Thellusson Act)	55, 172
1815.	55 Geo. III. c. 192 (copyholder's will)	50
1828.	9 Geo. IV. c. 14	158
1830.	1 Wm. IV. c. 40 (executors)	72
	c. 46 (powers)	106
1832.	2 & 3 Wm. IV. c. 1 (Crown Lands Act)	154
	c. 71 (prescription)	159, 160
1833.	3 & 4 Wm. IV. c. 27 (R. P. L. A.)	113, 131, 154-159
	c. 42 (civil procedure)	131, 154, 157
	c. 74 (fines and recoveries)	40, 44, 61
	c. 104 (administration)	58
	c. 105 (dower)	67, 100, 107
	c. 106 (inheritance)	64
1836.	6 & 7 Wm. IV. c. 71 (tithe)	113
1837.	1 V. c. 26 (wills)	26, 27, 47, 50, 93, 103, 162-171
1838.	1 & 2 V. c. 110 (judgments)	57, 167
1841.	4 & 5 V. c. 21 (statutory release)	182
1845.	8 & 9 V. c. 18 (Lands Clauses)	2, 7, 8, 59, 60
	c. 106 (R. P. A. A.)	28, 85, 121, 127, 128, 180, 181, 182
	c. 112 (satisfied terms)	124
	c. 118 (inclosures)	115
1851.	14 & 15 V. c. 25 (landlord and tenant)	128
1852.	15 & 16 V. c. 24 (W. A.)	163
	c. 76 (C. L. P. A.)	130
1853.	16 & 17 V. c. 137 (charitable trusts)	50
1854.	17 & 18 V. c. 113 (real estate charges)	144
1855.	18 & 19 V. c. 15 (Judgments A.)	120
	c. 43 (infants' settlements)	59, 195
	c. 124 (charitable trusts)	50
1856.	19 & 20 V. c. 97 (mercantile)	155, 158
1859.	22 & 23 V. c. 35 (L. P. A. A.)	64, 66, 73, 103, 120, 122, 130, 135, 174, 175
1861.	24 & 25 V. c. 114 (W. A.)	167

A.D.		PAGE
1862.	25 & 26 V. c. 89 (Companies A.)	50
1864.	27 & 28 V. c. 13 (charities)	50
	c. 114 (improvement of land)	36
1865.	28 & 29 V. c. 104 (Crown suits)	58
1867.	30 & 31 V. c. 69 (second real estate charges)	144
1868.	31 & 32 V. c. 40 (partition)	76
1869.	32 & 33 V. c. 46 (administration)	58
1870.	33 & 34 V. c. 23 (abolition of attainder)	15, 60
	c. 34 (charities)	50
	c. 35 (apportionment)	29
1873.	36 & 37 V. c. 66 (J. A.)	30, 139
1874.	37 & 38 V. c. 37 (powers)	106
	c. 57 (R. P. L. A.)	42, 131, 154, 157
	c. 78 (V. P. A.)	146, 190, 194, 196, 205
1875.	38 & 39 V. c. 55 (public health)	51, 136
	c. 77 (second J. A.)	58
	c. 87 (L. T. A.)	146, 185, 187
1876.	39 & 40 V. c. 56 (commons)	115
1877.	40 & 41 V. c. 18 (S. E. A.)	31, 37, 59
	c. 33 (contingent remainders)	86, 92
	c. 34 (third real estate charges)	144
1878.	41 & 42 V. c. 31 (bills of sale)	142
1881.	44 & 45 V. c. 41 (C. A.)	8, 38, 46, 55, 59, 61, 70, 83, 100, 104, 106, 108, 117, 121, 122, 129, 131, 134, 136-143, 147, 148, 149, 150, 173, 191, 193, 194, 196, 201, 205
1882.	45 & 46 V. c. 38 (S. L. A.)	7, 8, 31-38, 42, 43, 46, 59, 61, 69, 102, 105, 133, 134, 173, 176, 200
	c. 39 (second C. A.)	61, 93, 104, 107, 134, 148, 171
	c. 43 (Bills of Sale)	137, 142
	c. 50 (municipal corporations)	51, 137
	c. 75 (M. W. P. A.)	60, 68, 79, 155, 164, 165, 210
1883.	46 & 47 V. c. 52 (B. A.)	57
	c. 54 (Yorkshire Registry)	146, 187
1884.	47 & 48 V. c. 18 (second S. L. A.)	31, 34, 46, 68, 176
	c. 71 (intestate estates)	72, 109
1886.	49 & 50 V. c. 54 (extraordinary tithe)	113
1887.	50 & 51 V. c. 73 (Cop. A.)	70

A.D.		PAGE
1888.	51 & 52 V. c. 41 (local government)	51, 137
	c. 42 (Mortmain)	50, 51, 52
	c. 59 (T. A.)	157
1889.	52 V. c. 7 (Customs A.)	185, 196
1889.	52 & 53 V. c. 30 (Board of Agriculture)	115
1890.	53 & 54 V. c. 5 (lunacy)	60
	c. 29 (intestate estates)	72
	c. 69 (fourth S. L. A.)	34, 35
	c. 70 (workmen's dwellings)	52
	c. 71 (bankruptcy)	57
1891.	54 V. c. 8 (tithe)	113
	54 & 55 V. c. 22 (museums, &c.)	52
	c. 39 (Stamp A.)	186, 189
	c. 64 (Middlesex Registry)	187
	c. 73 (Mortmain)	52
1892.	55 & 56 V. c. 11 (Mortmain)	53
	c. 13 (third C. A.)	133, 150
	c. 58 (accumulations)	56, 172
1893.	56 & 57 V. c. 21 (voluntary assurances)	54
	c. 53 (T. A.)	33, 59, 105, 108, 151, 173, 175
	c. 63 (M. W. P. A.)	165
1894.	57 & 58 V. c. 10 (T. A.)	173
	c. 30 (finance)	4, 185, 196
	c. 46 (Cop. A.)	18, 19, 108
	c. 73 (local government)	51, 137
1896.	59 & 60 V. c. 35 (judicial trustee)	109
1897.	60 & 61 V. c. 65 (L. T. A.)	4, 27, 42, 58, 63, 69, 75, 101, 144, 146, 161, 174, 186-187, 196, 200
	c. 48 (benefices)	112
1899.	62 & 63 V. c. 20 (bodies corporate joint tenancy)	109
	c. 30 (commons)	51
	c. 46 (lands improvement	36
1900.	63 & 64 V. c. 26 (land charges)	57, 120
	c. 62 (colonial stock)	33, 173
1906.	6 Ed. VII. c. 55 (public trustee)	108, 109
1907.	7 Ed. VII. c. 18 (M. W. P. A.)	166
1908.	8 Ed. VII. c. 28 (agricultural holdings)	5, 127, 131, 158
	c. 47 (lunacy)	60
	c. 69 (Companies A.)	50

A.D.		PAGE
1911.	1 & 2 Geo. V. c. 37 (C. A., 1911)	61, 106, 122, 140, 141, 174
	c. 40 (lunacy)	55, 60
1914.	4 & 5 Geo. V. c. 59 (Bankruptcy A.)	54, 57, 131, 150, 158
	c. 78 (emergency powers)	132 (a), 152
1915.	5 & 6 Geo. V. c. 70 (trusts, war facilities)	36 (a)
	c. 97 (increase of rent)	124 (a), 126 (a), 152
1916.	6 & 7 Geo. V. c. 13 (emergency powers)	132 (a), 152
	c. 18 (emergency powers)	132 (a), 152, 160 (a)
1917.	7 & 8 Geo. V. c. 25 (emergency powers)	132 (a), 152
1918.	7 & 8 Geo. V. c. 58 (soldiers' and sailors' wills)	59, 102, 164
	8 & 9 Geo. V. c. 7 (increase of rent)	124 (a), 126 (a), 152
1919.	9 Geo. V. c. 7 (increase of rent)	124 (a), 126 (a), 152

INDEX.

Abridgment of estate, 23, 90, 91, 137
Absence beyond seas, 155
Absolute property, 1, 2
Abstract of Title, 193, 194
Accession, 76, 77, 78
Accumulation, 55, 172
Acknowledgment,
by married women, 61
by vendor, 193
of debt, 158
under Statutes of Limitation, 156
Action, 3
Administration, 58
Administrator, 63, 174
Admittance to Copyholds, 18, 36, 178
Advancement, 70, 177
Advowson, 112, 159
recovery of, 113
Agreements for lease, 127
Allodium, 10
Ambiguity, 168
Ancient demesne, 20
Animals, 5
Annuities, 121, 133
Answers to requisitions, 194
Appendant rights, 111, 114
Appointment, 89, 104, 184, 212
powers of, 101, 102
Apportionment of condition, 83, 130
of rent, 29, 120
Approvement, 114
Appurtenant rights, 111, 114
Assets, 4, 58, 175
Assignment, 4, 181
of contingent remainder, 85
of mortgage debt, 148, 203
of term, 128, 132, 181
Assigns (or assignees), 82, 128, 129
Attestation,
of deed, 103
of will, 103, 162
Attornment Clause, 142
by mortgagor, 142
by tenant, 82
Authorised improvements, 33

Bankruptcy, 53, 56-57, 131, 150
Bargain and sale, 125, 179, 181, 182
Base fee, 41, 42, 156
Base tenure, 12, 17
Bill of Sale, 137, 142
Board of Agriculture, 33, 76, 114, 115, 122

Bona vacantia, 71
Borough English, 14, 64, 72
Boroughs, 51
Botes, 29
Breach of trust, 157
Building society mortgages, 146
Burgage, 14, 49

Capital, money, 30, 33
Cautions, 187
Certificate, 185
Cesser, 134
Cestui que trust, 97, 98
Cestui que use, 96, 97
Cestui que vie, 27, 28
Channel Isles, 9
Charge, 58, 120, 121, 174
Charitable trusts, 50
Charitable uses, 51
Chattel interests, 62, 70, 71, 123
Chief rents, 16, 48, 119
Children, illegitimate, 168
Codicil, 165
Collateral bond, 156
Collateral power, 103
Colleges, 52
Colonies, 9
Commission, 142
Committee of lunatic, 37, 60
Common, 16, 113
Common recovery,
  barring entail, 39
  lease, 125
  socage, 49
Community, 2
Commutation,
  of manorial rights, 19
  of tithe, 113
Concealed fraud, 157
Conditional limitation, 23, 24
Conditions,
  express, 24
  implied, 24
  of re-entry, 8, 23, 83, 121
  precedent, 24
  subsequent, 23
Consolidation, 147, 148
Construction of wills, 167, 168
Continuing trustee, 108
Continuous easements, 115-118
Contract of sale, 193
Conversion, notional, 4, 5
Conveyances, 4, 179
  C. L., 179-181
  St. of uses, 181-183
  under other St., 183, 184
Convict, 59, 60
Coparcenary, 65, 74, 79
Copyholds, 12, 17, 44, 50, 63, 64, 67, 69, 72, 77, 90, 101, 108, 114, 119, 125, 149, 167, 170, 178, 193, 194, 200, 201
Corporations, 51, 95, 109, 112
Corporeal hereditaments, 8, 9, 179, 180
County Council, 51
Court Baron, 16-17
  customary, 16, 18
  leet, 16
  roll, 17, 44, 200
Covenant in statutory mortgage, 151
  to stand seised, 179, 182
  to surrender, 149
Covenants,
  affirmative, 128
  in leases, 128
  of title, 191
  restrictive, 47, 129
  running with land, 128
Cross remainders, 77

Crown,
administrator, 60
debts, 42, 58
lands, 8, 11
lord paramount, 10, 11, 48
Curtesy, 15, 26, 37, 64, 68, 69, 80, 169
Custom, 14, 18, 44, 64, 69, 101, 114, 117, 200
Customary,
court, 18
dower, 69, 101
freeholds, 20, 63
heir, 63
Cy-près doctrine, 86

Declaration of trust, 107, 201
Deed enrolled, 40-41, 44
parts of, 189
requisites of, 188
Deed-boxes, 6
Deed-poll, 212
Delivery, 188
Demesne, 16, 32
Demise, 127, 180
Descent, 64-67, 72-73
Determinable fee, 23, 170
Devise, 26, 64
Devolution, 63, 64
Disclaimer, 133, 150
Disentailing assurances, 40
Dispossession, 2
Distress, 113, 119-121, 131, 142
Distribution, statutes of, 72
District council, 51
Divine service, 15
Divorce, 67
Domesday Book, 10
Dominium, 1
Dower, 26, 64, 67, 79, 100, 159
Dowress, 37, 41
Draft conveyance, 194
Drainage, 33

Easements, 100, 111, 115, 159-160
Election, 68
Elegit, 7, 26, 42, 57, 123
Emblements, 29, 124
En autre droit, 84
Enclosure, 64, 114-115
Encroachment, 114
Enfranchisement, 19, 36
Engrossment, 194
Enlargement of base fee, 41
of long term, 134, 135
Enrolment of bargain and sale, 182
of disentailing assurance, 40
of gift to charity, 51, 52
Ensigns of honour, 6
Entry under feoffment, 179
lease, 125, 127
Equitable estate, 2, 44, 61, 68, 88, 90, 98, 107
execution, 57
interest, 61
mortgage, 136, 150
powers, 101
remainder, 90
waste, 29, 48
Equity of redemption, 138, 143, 144-145
clog on, 138, 139
Escheat, 16, 19, 64, 72, 109
Escrow, 188
Escuage, 12
Estate clause, 190
Estate duty, 4, 195
Estates—
fee, 12, 22, 46-62, 88, 93, 170

less than freehold, 22, 123
life, 22, 26-38, 39, 77, 97
tail, 22, 38-46, 77, 78, 168-169
Estoppel, 133, 190
Estovers, 29, 113
Excessive appointment, 105
Execution, 102, 194
Executors trading, 172
Executory devise, 81, 91
Executory interests, 54, 81 90-94
Expectancy, 2, 81-94
Extrinsic evidence, 168

Failure of heirs, 66, 72
Fair, 118
Farmhouse, 34
Fealty, 13, 18
Fee farm rent, 35, 120
Fee simple, 2, 38, 39, 46-50
Feoffee to uses, 96
Feoffment, 15, 28, 95, 137, 179
Ferry, 118
Feudal system, 10, 21
Fief, 10, 12
Fine, 40
Fines in copyholds, 18, 178
Fixtures, 5
Flotsam and jetsam, 118
Folkland, 11
Foreclosure, 143, 156
Forfeiture, 85
Formalities of will, 162
Franchise, 7, 111, 118
Frank tenement, 12
Frankalmoign, 15
Fraud—
on creditor, 53
on power, 105
on purchaser, 54
Fraudulent appointment, 105
Free bench, 19, 69
Free fishery, 118
Free socage, 12
Freehold, 13, 67-8
Further assurance, 192

Gas company, 51
Gavelkind, 14, 59, 180, 183
General occupant, 27
General words, 190
Germins, 30
Glebe lands, 112
Goods and chattels, 4
Grand serjeanty, 13
Grant, 9, 180, 183
to uses, 41, 109, 179
Ground rent, 120 (*a*)

Habendum, 191
Half-blood, 66, 70
Hay bote, 29
Heir,
apparent, 63
expectant, 63
Heirloom, 6
Hereditaments, 3, 4, 8, 111, 179, 180, 183
Heriots, 16, 18
Honour, 17
Hotchpot, 70, 177, 209
House bote, 29
Husband,
right to wife's freeholds, 61, 68
right to wife's leaseholds, 71, 135

Immovables, 3, 4
Impeachable for waste, 30, 34
Improvements, 36
Impure personalty, 52
In gross, rights, 111, 112, 114

Inclosure, 115
Incorporeal hereditaments, 8, 111, 180
Incumbered land, 32
Incumbrances, discharge of, 33, 122
Indefinite failure of issue, 93, 171
Indenture, 189
Infant executor, 165
  in gavelkind, 14, 59, 180, 183
  trustee, 108
  under Settled Land Acts, 37, 59, 173
  wills of, 59, 102, 164
Inheritance, 63-67
Inhibitions, 187
Inter esse termini, 125
Interest,
  on mortgage, 142, 152 (*a*)
Interests in land,
  contingent remainders, 81, 85
  executory interest, 81, 90, 91
  term of years, 22, 82, 127-130
Ireland, 9
Isle of Man, 9
Issue, 38, 65, 93, 168, 169, 171

Joint tenancy, 74-76, 79, 109
Jointure, 68, 75, 133
Judgment creditor, 7, 25, 42, 57
  debts, 42, 57
Judicial trustee, 109

Land certificate, 185
Land Commissioner, 19
Land Registry, 184, 187
Lands, 2, 3, 8
Lapse, 169
Lateral support, 118
Lay impropriator, 112, 113
Lay rector, 112
Lease, 127, 128, 133, 179, 180, 182
Lease by estoppel, 133
Leaseholds, 4, 45, 124, 149, 167, 208, 210
Leave of Court, 34
Legacy, 4, 176
Legal estate, 2, 61, 92, 95-99, 107, 108, 109, 136, 184, 208
Legal memory, 111, 159
Lessor and lessee, 130, 131, 204
Liberum tenementum, 12
Licence, 117, 160
Lien, 137
Life estate by implication, 26
Light and air, 116, 117, 160
Limitation,
  statutes of, 153-157
  words of, 25-26, 38, 46-47, 88, 170
Limited owner, 2, 31
Lis pendens, 46, 58
Livery by deed, 179
  in law, 180
  of seisin, 9, 179
Local authority, 52, 151
Local Government Board, 152
Locus sigilli, 188, 199
Lunatic, 7, 59, 108

Maintenance, 173
Manor, 16, 44, 69, 101, 111, 112, 114
Mansion house, 16, 32, 33, 34
Marketable title, 194

Marriage, 23, 67, 68, 76, 79
Married woman, 60, 68, 79, 135, 155, 164
Memorandum of charge, 150
Merger, 84, 85, 121, 128
Mesne lord, 11, 16
Middlesex Registry, 187
Mines, 8, 18, 19, 29, 35, 48
Mixed property, 3
Mortgage, 24, 136
  equitable, 136, 145, 150
  legal, 25, 35, 69-70, 137-150
  Welsh, 138
Mortgagee (powers of), 140-141, 143
Mortgagor (powers of), 139-140
Mortmain, 50, 188
Movables, 2, 4
Municipal borough, 51

Name and arms, 99
Negative easement, 115
  prescription, 153
Next presentation, 112
Nomination,
  of new trustees, 108, 175, 207
Notice, 32, 34, 59, 124, 126, 127, 129, 145, 146, 148, 187
Notional things, 7

Open contract, 194, 196
Operative words, 190
Outlawry, 28
Ownership, 1, 2, 10

Parcels, 190
Parol lease, 124, 126-7
Particular estate, 83, 85, 90
Partition, 36, 76, 77
Partnership lands, 7, 75
Pasture, 114
Per capita, 65, 71
Per stirpes, 65, 70
Perpetual rent-charge, 120
Perpetuity, 54, 86, 104, 117, 172
Personalty, 2, 3, 4, 62, 70, 124, 209, 210
Petit serjeanty, 14
Pin money, 210
Piscary, 113
Pledge, 137
Plough bote, 29
Portions, 43, 56, 133, 209
Possession, 2, 43
  estates in, 81
  of leaseholds, 125
  transmutation of, 184
Possibility of reverter, 83
  double, 86, 87
  second, 87
Posthumous children, 66
Power of attorney, 106
Powers, 101-106
  exclusive, 106
  non-exclusive, 106
  of sale (executor), 101, 174
  (mortgagee), 140, 149
  (mortgagor), 140
  (revocation of), 106
  (trustees), 37, 46, 174, 176
Prescription, 153, 159
Probate, 4, 166
Production of *cestui que vie*, 28
Profit à prendre, 111, 113
Property, meaning of, 1
Protector, 41

Proviso,
for cesser, 134
for re-entry, 205
for redemption, 25, 138, 203
Puisne mortgagee, 145, 150
Pur autre vie, 27, 97
Purchase, 64
Purchaser, 64

Qualified property, 1, 2
Quality of estate, 2
Quare impedit, 113
Que Estate, 159
Quia emptores, 16, 119
Quit rent, 18, 119, 122
Quousque seizure, 18

Rack rent, 124
Railway,
company, 51
lands, 7
Rates (local authorities), 136
Realty, 2, 3, 4
Receipt,
of trustees, 175
of vendor, 198
Receiver, 57, 140-141
Recitals, 189
Reconveyance, 25, 148, 203
Recovery of possession of land, 154-159
Rector, 112
Rectory, 112
Register, 184
Registration, 179, 184-187
Release, 76, 78, 101, 117, 120, 179, 181, 182
Reliefs, 16
Remainder, 83-86
contingent, 85
vested, 84
Remoteness, 54, 92
Rent, arrears of, 130-131, 157,
fee farm, 35
increase of, 126 (*a*)
peppercorn, 35, 134
recovery of, 130
Rent-charge, 2, 118, 120, 121-122
Rent-seck, 119
Rent-service, 119, 121
Repugnancy, 56
Reputed manor, 17
Requisites of deeds, 188
Requisitions, 194
Restraint,
on alienation, 50, 56
on anticipation, 60
Restrictions, 187
Restrictive covenants, 47
Resulting use, 96, 110, 210
Return to writ, 57
Reversion, 81, 82, 83
Revocation of uses, 102, 213
of will, 166
Right,
in grant, 118
in personam, 3, 136
in rem, 1, 136
of ownership, 1
to redeem, 140
Royal mines, 8
Rural authorities, 51

Sale,
by executor, 101, 174, 178
by mortgagee, 140, 144
by mortgagor, 140
by owner, 31, 48, 49, 198
by trustee, 46, 105, 174
Satisfied term, 134
Scotland, 9
Sealing of deed, 188
Searches, 194

Second mortgage, 145
Seigniory, 16, 112
Seisin, 12, 64
per my et per tout, 75
per my, 78
per tout, 79
Separate estate, 37, 60, 69, 135
Services, 11, 12, 119
Settled chattels, 6, 32, 45
Settled land, 31
Settlements of land, 31-38, 43, 206-211
personal, 206
real, 206, 207
Severalty, 2, 74
Severance, 76, 77, 78
Shack, 114
Shares, 4, 6-7, 74, 173
Shifting uses, 81, 91, 99
Sic utere tuo, etc., 1, 51
Signing,
deed, 188
will, 163
Simple contract debt, 58
Special occupant, 27
Specialty debt, 58
Springing uses, 81, 91, 99, 210
Stamps, 188
Statute barred debt, 158
merchant, 123
staple, 123
Statutory mortgage, 136, 151, 152
powers, 101
Strict settlement, 43, 207
Sub-demise, 125, 129, 131, 205
Sub-dominium, 1, 48
Subinfeudation, 11, 16, 119
Succession duty, 195
Sufferance, 22, 124
Suit of customary court, 18
Superstitious uses, 54
Surrender, 36, 85, 121, 128, 179, 181
Surviving trustee, 108

TABLES—
A (property), 9
B (tenures), 21
C (estates), 62
D (devolution), 73
E (community), 80
F (expectancy), 94
G (uses), 110
H (incorporeal hereditaments), 122
I (chattels real), 135
J (mortgages), 152
K (limitation and prescription), 161
L (wills), 178
M (conveyances), 197
N (deeds), 197
Tacking, 145
Tenancy in common, 76, 79
at sufferance, 22, 123, 124
at will, 22, 123
by entireties, 79
for life, 27-38
in tail after, etc., 25, 26, 37
Tenant from year to year, 22, 126
in capite, 11
in paravail, 11
of a house, 127
to the *præcipe*, 39
Tenement, 3, 8
Tenure, 10, 119
imperfect, 82
improper, 119
Term of years, 22, 90, 92, 126-135

attendant on inheritance, 134
satisfied, 134
Things owned, 1
Timber, 18, 29, 30-31, 106, 141
ornamental, 31
Time immemorial, 111, 159
Tithe,
extraordinary, 113
great, 112
small, 112
Title, 194-196
absolute, 184
possessory, 184
qualified, 184
Title-deeds, 6
Titles of nobility, 8, 78
Tolls, 7
Tortious operation, 28
Trader's settlement, 35, 45
Tramway company, 51
Transfer of property, 2
Treasure trove, 118
Trees, 5
Trustee, bare, 41, 165
consent of, 34, 35
for sale, 31, 46, 105
of settlement, 32, 33, 46
retirement of, 108
to preserve contingent remainders, 85
under Settled Land Acts, 31-32
Trust term, 135
Trusts, 98, 135, 157, 170-175
Turbary, 113

Underlease, 125, 132, 133, 206
Undertaking, 193
Universities, 52
Urban authorities, 51
Use and occupation, 128
Uses, active and passive, 95-98
to bar dower, 100

Vendor's lien, 144
Vesting order, 59, 60, 108
Vicar, 112
Vicinage, 114
Villeinage, 12, 17
Villeins, 16, 17
Voluntary settlements, 53
Vouching to warranty, 39

Waifs and Strays, 118
Waiver, 130
Wales, 9
Waste,
equitable, 29, 30, 48
permissive, 29, 30
voluntary, 29
Wastes of manor, 16, 114
Water, 8, 118, 160
company, 52
Way, right of, 115, 116, 160
of necessity, 116
Will made abroad, 167
of copyholds, 167
of infant, 164
of lands, 49, 162
of leaseholds, 167
of married woman, 164
of personal property, 167
soldiers and sailors, 59, 102, 164
tenancy at, 22, 123
Writ of extent, 42, 58

Year to year tenancy, 126
Yorkshire registry, 187

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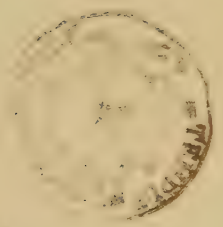

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SUBJECT INDEX.

	Page
Admiralty	4
Banking	4
Bankruptcy	4, 5
Bills of Exchange	5, 6
Carriers	6
Common Law	6, 7, 8
Companies	8, 9
Conflict of Laws	9
Constitutional Law	9, 10
Contracts	10
Conveyancing	11
Criminal Law	12
Easements	13
Ecclesiastical Law	13
Equity	13, 14
Evidence	15, 16
Examination Guides	17
Insurance Law	17
International Law	18
Jurisprudence	18, 19
Latin	19, 20
Legal History	19
Legal Maxims	19, 20
Local Government	20
Master and Servant	6
Mercantile Law	21
Mortgages	21
Partnership	21
Personal Property	22
Procedure	22, 23
Real Property	23, 24
Receivers	25
Roman Law	25, 26
Sale of Goods	27
Statutes	27
Torts	27, 28
Wills	28

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